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IN THE

Supreme Court of the United States

October Term, 1999

IN RE THE WELFARE OF HANNAH S.

B.S. and L.S.,
Petitioners,

v.

THE WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

This petition presents the following questions regarding the Fourteenth Amendment standards governing state proceedings to permanently terminate parental rights, *see M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), *Santosky v. Kramer*, 455 U.S. 745 (1982):

1. Whether the constitutional requirement that the State must establish the basis for a parental rights termination by clear and convincing evidence can be satisfied by proof of the fact that the parents did not prevail in separate child welfare proceedings in which they bore the burden of proving that there was no reason for the continued removal of their child from their home.

2. Whether the constitutional requirement that the basis for a parental rights termination be established by clear and convincing evidence can be satisfied by an "implicit" determination of current parental unfitness.

3. Whether the constitutional requirement that the basis for a parental rights termination be established by clear and convincing evidence applies to a statutory requirement that termination be shown to be in the child's best interests.

4. Whether a state can utilize statutory criteria governing parental rights termination decisions which are so vague as to permit wholly arbitrary enforcement.

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IN RE THE WELFARE OF HANNAH S.

B.S. and L.S.,
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THE WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
***Respondent*[1].**

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Petitioners Brent and Lorilei Swenson pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the State of Washington, which affirmed a trial court's order terminating their relationship with their only child, their daughter Hannah.

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[1]The parties to the proceedings below included petitioners Brent and Lorilei Swenson, their daughter Hannah, Hannah's guardian ad litem Mildred Staley, and Hannah's foster parents Mitch and Laura Swenson.

OPINIONS BELOW

The opinion of the Court of Appeals below is reported at *In re the Welfare of H.S.*, 94 Wn. App. 511, 793 P.2d 474 (1999) and is set forth as Appendix A to this petition. The order of the Supreme Court of Washington denying petitioners' timely-filed petition for review of the Court of Appeals decision appears at Appendix B. The Findings of Fact, Conclusions of Law and Order of Termination of Parent-Child Relationship entered by the Superior Court of the State of Washington for Spokane County which was affirmed by the Court of Appeals, is reproduced as Appendix C.

JURISDICTION

The order of the Supreme Court of Washington denying petitioners' petition for review of the decision of the Court of Appeals was entered on September 28, 1999. App. B 1. The time for filing this petition was extended by Justice O'Connor on December 16, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), as petitioners are claiming a violation of their rights, privileges and immunities guaranteed by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

> person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

This case also involves several Washington statutes, which are lengthy and are therefore set forth in Appendix E to this petition.

STATEMENT OF THE CASE

This petition seeks review of the judgment of the Court of Appeals of the State of Washington terminating the parent-child relationship between petitioners Brent and Lorilei Swenson and their daughter, Hannah.

Petitioners were forever deprived of all rights with respect to their daughter because the Washington courts found their parenting skills showed "deficiencies that are manifestations of mental illness." App. A 1. These deficiencies involved what the State deemed the child's "emotional and developmental needs." App. A 15. There was no claim Hannah was beaten, abused or abandoned. The decision below acknowledged that petitioners "unquestionably love" their daughter (App. A 1) and it was undisputed that--when the State would let them--they fed and clothed her, kept her clean, provided her a home and medical care, read to her, played with her, and took her places.

The decisions below also acknowledged that petitioners made their "best and sincerest efforts to resolve their parental deficiencies." App. A 2. In fact, the courts below found that the specific problems that originally led the State to intervene in the Swensons' life were resolved before the termination proceedings even began. See App. A 9-10. However, the juvenile court denied petitioners' requests to have Hannah returned to them--which under

Washington law led to the termination of their relationship with her--because petitioners could not show that no *other* "valid reason for removal of this child from the parents' home still exists ...." See App. D 1.

The termination decision was ultimately based on conclusions regarding petitioners' inability to provide "proper care" and the unlikelihood that "conditions" would change--statutory terms the lower courts refused to define except by reference to all the facts in this case. See App. A 11-12. The termination was ordered and upheld despite the trial court's failure to find by clear and convincing evidence that it was in Hannah's best interest. See App. A 17. To the contrary, announcing its termination decision, the trial court said that it would be a "travesty" if petitioners were not allowed "continued involvement ... in the life of their daughter"--but its order unequivocally put an end to that involvement. See App. C 16.

An understanding of how this "travesty" occurred, and the federal constitutional questions it raises, requires some familiarity with Washington's child dependency and parental termination laws. We turn to that subject first, before describing in more detail how those laws were applied and upheld in petitioners' case.

A. The Law Governing Parental Termination Proceedings In the State of Washington.

Parental termination proceedings in the State of Washington are governed by two basic statutes, RCW 13.34.180 and 13.34.190. See Appendix E 4-6.

Under these statutes, an order permanently terminating a parent-child relationship often follows from a "dependency" or child welfare action, as it did in petitioners' case. A dependency action involves temporary

state intervention and can be based on proof of one of several statutory grounds--abandonment, some form of abuse or neglect, or the absence of a "parent, guardian, or custodian capable of adequately caring for the child." See RCW 13.34.030(2), App. E 1. Because this deprivation is not permanent, the State needs to establish the grounds for dependency only by a preponderance of the evidence. RCW 13.34.130; see *In re J.C.*, 130 Wn.2d 418, 421n.3, 924 P.2d 21 (1996). If a child is found dependent and removed from her parents' custody, she cannot be returned to the parents' home "unless the court finds that a reason for removal ... no longer exists" RCW 13.34.130(5), App. E 2; see App. D 1.

The fact that a child has been found dependent, removed from the home, and not returned to her parents' custody for more than six months, constitute the first three elements which the State must prove in order to permanently terminate the parent-child relationship. RCW 13.34.180(1)-(3), App. E 4. These elements must be proved by "clear, cogent and convincing evidence." See RCW 13.34.190(1), App. E 7. The other three elements that must be proved by this standard[2] in a termination hearing are: that all "reasonably available" services have been provided, that there is "little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future," and that "continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." RCW 13.34.180(4)-(6), App. E 4.

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[2]In addition, to enter a termination order the trial court must find that "such an order is in the best interests of the child." RCW 13.34.190(4), App. E 7. However, under Washington law this factor need not be proved by "clear, cogent and convincing evidence". Ibid.

Neither the statute nor Washington caselaw defines the crucial word "conditions" in the fifth of these elements.[3] In fact, as reflected in the decision of the Court of Appeals below, the Washington courts have refused to hold even that "the 'conditions' of RCW 13.34.180(5) are limited to the facts of the original dependency." App. A 9. At the same time, as the Court of Appeals below emphasized, the Washington cases have held that

> [i]t is not necessary to re-establish the original dependency at termination. *In re Dependency of J.C.*, 130 Wash.2d 418, 428, 924 P.2d 21 (1996). The review process results in repeated, updated findings of the dependency. Former RCW 13.34.130(5); *In re A.W.*, 53 Wash.App. 22, 28, 765 P.2d 307 (1988), *review denied*, 112 Wash.2d 1017 (1989).

App. A 10. Rejecting arguments that these rules and the lower standard of proof at dependency proceedings undermine the constitutionally required burden of proof at termination, the Washington courts have declared that "if the state proves the allegations [required by RCW 13.34.180] ... an implicit finding of current parental

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[3]A subsection of that section which was relied upon by the trial court in this case provides that "[i]n determining whether the conditions will be remedied the court may consider, but is not limited to" "[p]sychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time, and ... documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future." RCW 13.34.180(5)(b), App. E 4; see App. C 15. No statute or Washington case defines the phrase "proper care" as it appears in this subsection.

unfitness has been made," *In re K.R.*, 128 Wn.2d 129, 142, 904 P.2d 1132 (1995). As the Court of Appeals' decision below put it:

> [T]ermination proceedings are not a relitigation of the dependency issues, and the accuracy of the facts underlying the original dependency adjudication is not deemed critical. *Krause* [*v. Catholic Community Services*,] 47 Wash.App. [734] at 743, 737 P.2d 280 [(1987)]. The issue at termination is current unfitness. *In re Dependency of K.R.*, 128 Wash.2d 129, 142, 904 P.2d 1132 (1995). If the elements of RCW 13.34.180 are proved, current parental unfitness is implicitly established. *J.C.*, 130 Wash.2d at 428, 924 P.2d 21; *K.R.*, 128 Wash.2d at 142, 904 P.2d 1132.

App. A 10.

B. The Proceedings Below.

The contradictions of this statutory system manifested themselves with a vengeance in this case.

1. The Dependency Proceedings.

The judicial intervention in the Swensons' family life began with the filing of a dependency action in March, 1993, when Hannah was four months old. Petitioners agreed to the orders of dependency and complied with the conditions imposed upon them to deal with the specific problems identified in the dependency action: a concern that Hannah was not gaining weight and could be at risk for "failure to thrive"; and fear, arising from a statement

Lorilei Swenson had volunteered to a social worker, that Hannah might be at risk of sexual abuse.[4]

Under treatment and supervision by State selected examiners, petitioners successfully addressed these original concerns. However, as they did, in the trial court's words, "[t]he circumstances of the dependency evolved" and the "focus ... shifted." App. C 11.

When the case came back to court for review in early October, 1993, the Juvenile Court Commissioner found that "a reason for removal of the child from his/her home as set forth in RCW 13.34.130(1)(b) ... continues to exist," which it explained as follows:

> The parents visit regularly and have participated in services. No reports have documented that they have been able to make the changes necessary to be able to parent this child or that progress has been made.

Three weeks later--without waiting the statutorily required six months after the dependency and removal, see RCW 13.34.180(3)--the State filed its first petition for the termination of petitioners' relationship with Hannah. In February, 1994, this termination petition was dismissed, and the dependency went on.

In June, 1994, the doctor who Lorilei Swenson had been ordered to see for a psychosexual evaluation reported that "Lori has made considerable strides in the past year," and found her "credible in stating that she no longer had

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[4]Mrs. Swenson told the social worker in January 1993, when Hannah was two months old, "I'm afraid to change the baby's diaper, because I feel like I want to kiss her on the labia."

sexual impulses involving Hannah." He also found Mrs. Swenson's "[c]oncentration and attention appeared to be within normal limits" and "no indications of hallucinations or delusions." Yet the dependency went on.

Petitioners' visitation was increased in the spring of 1995 to the point where Hannah was staying with them for 40 hours a week, unsupervised. However, a dependency review in July, 1995, again found that "a reason for removal of the child from his/her home ... continues to exist". This time, the reason was that "[t]he parents continue to require significant support during visits regarding judgment concerning the child and stress levels."

In September, 1995, petitioners were ordered to submit to yet another psychiatric evaluation. This examiner, Dr. Michael Manz--to whom petitioners objected as biased--reported that he found no "evidence ... which would conclude [sic] that they [petitioners] could adequately parent their daughter" and recommended that the State reduce visitation and seek termination.

The Juvenile Court accordingly reduced petitioners' visitation schedule and, citing court congestion, put off their pending Motion to have Hannah returned to them. That Motion was finally heard and denied--after a new termination petition was filed--in April, 1996.

In denying the motion to return Hannah to her parents, the Juvenile Court Commissioner said expressly that he was doing so although the factual basis for the original dependency and removal no longer existed.

> Are things the same now as they were when the dependency started and the child was originally removed? I think the answer to that is no. ... There were issues about the mother having thoughts of

> placing the child at risk for sexual abuse. Frankly, that, at present, does not constitute a risk to this child. And frankly, I don't see the case as being about that issue. There was initially question about failure to thrive of a three-month-old child. And I think the issues have completely changed there, also.

App. D 1. The Commissioner noted that under Washington's dependency and removal statutes the fact things had "completely changed" with regard to the original grounds for the dependency did not end the matter.

> In dealing with the applicable statute, 13.34.130, in a context of a review hearing, the legislature has shifted the focus. Initially, in a dependency, the focus is, in terms of language, that the child shall, essentially, not be removed from the home unless the state shows (a), (b) and (c). In the context of a review hearing, that focus switches, and it says the child shall not be returned unless the court finds a valid reason for removal no longer exists. So, the question at this point is whether, simply stated, a valid reason for removal of this child from the parents' home still exists today.

Ibid. (emphasis added). The Commissioner found none of the usual "valid reasons" for dependency or removal.

> There's never been any claim of intentional abuse of this child, and that certainly is not an issue in this case. No one would anticipate or expect that either of these parents would do anything to damage this child on an intentional basis. To the contrary, they have, in most respects, complied with the requests of the court

> along the way, and engaged in and benefited from services to the extent that they have been able.

App. D 3.

> If we look at just the basic parenting functions, if we break this down into its component parts in terms of simple things -- preparing meals, cleaning a house, doing laundry, reading books to a child -- in many respects the parents, having stabilized their mental conditions, have made dramatic progress. The parents are now able to meet the basic day-to-day needs of this child in this respect. They can keep a home. They can clean a house. They can provide meals. They can do that within acceptable standards, at least to the level that it would not pose a serious risk of harm to this child.

Ibid. However, the new "focus of the case," the Commissioner said, was "where would we go from here in terms of parenting." Ibid.

> At this point the court would find that rather than being in danger of physical needs going unmet, that the real risk to this child would be to the child's emotional development if returned home.

App. D 5. The Commissioner's written order reflected similar considerations.

In light of the Commissioner's finding that the original grounds for dependency and removal no longer existed, petitioners moved to dismiss the dependency. In support of this motion, they argued that they were denied due process by the failure to provide notice and a hearing on specific allegations of grounds for continued

dependency. The Commissioner denied that motion and petitioners sought appellate review. That review was pending in October, 1996, when the trial court held a hearing on the State's second petition to permanently terminate petitioners' relationship with their daughter.

2. The Termination Proceedings.

The termination hearing was conducted before a different trial judge, and went on for several days.

The testimony at the termination resembled that before the Juvenile Court Commissioner. There was general agreement that any danger that Lorilei Swenson might have inappropriate sexual contact with Hannah had disappeared, if it ever existed. Although Hannah was still quite thin, there was no doubt she was healthy. There was no testimony that petitioners had ever deprived Hannah of clothing, shelter, or medical care or food--to the contrary, the State at one point argued they tried to feed her too much. There were absurd descriptions of scenes where more evaluators than family members were present in the petitioners' small apartment, documenting the family's every movement and word. There were detailed logs of years of visits and observations, and no testimony from anyone that the Swensons had done anything that had actually harmed or endangered their daughter.[5]

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[5]The closest thing to a "danger" was testimony that petitioners had failed to tape the cord of an electrical crockpot in their kitchen to the wall. Although petitioners testified that they had dealt with the problem by moving the crockpot away from the edge of the shelf, some of the State social workers did not believe their response was adequate.

At the end of the testimony, the trial court announced its decision, which echoed the decision of the Juvenile Court Commissioner six months earlier:

> I would mention that I re-read Commissioner Valente's April, '96, Oral Decision several times, and it would appear to this Court that his observations at that time are very similar to this Court's observation at the present time. We have a diagnosis of schizophrenia. There are some questions about the legitimacy about that. There is no question, however, that both Brent and LoriLei suffer from mental illness of some kind. ... Testimony is that Brent still suffers from stress that can be overwhelming and that he takes steps to avoid that stress when he feels it oncoming, such as when Hannah becomes too difficult to handle, will leave the room, et cetera; that LoriLei sometimes is rigid, concrete, inflexible, and hasn't overcome those problems....
>
> There are two common themes that run through the testimony. One is that this matter needs some finality. Number two, that change for Hannah would be traumatic. There's a third theme that was developed, that there should be ongoing contact between Hannah and both the birth parents and the foster parents....
>
> As I have indicated previously, if I didn't make a decision today, it would just extend that for a longer period of time, and the evidence before this Court does not give this Court any assurance that it would ever result in reunification. Consequently, the Court grants the Petition for Termination.

The court then went on to add two "suggestions:"

> However, the Court wants to add two things, and I don't know if it can be made part of the Order, but I want it in there, at least as a suggestion from this Court, that there be continued involvement by Brent and LoriLei in the life of their daughter, Hannah. I think it would be a travesty if they were not allowed that opportunity. And the other thing is that the foster parents should continue to use the name of Hannah....

The written Termination Order similarly acknowledged that the original bases for these dependency no longer existed[6] but said that "[t]he circumstances of the dependency evolved" and "the focus has shifted to inability of the parents to meet the child's needs." App. C 11. However, it said that "the parents are unable to parent this child with little or no likelihood of change in the near and foreseeable future" because "[c]hronic mental health issues interfere with the parents' abilities to meet the child's physical, emotional and developmental needs." App. C 7.

The Order also held that termination was in the child's "best interests". App. C 16. However, inconsistently, it said that "some contact between the child and her biological parents may be in her best interests." App. C 14. In an apparent effort to resolve this dilemma, the Termination Order repeated the trial court's "recommendation" that, after termination, petitioners be

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[6]The Termination Order referred only to testimony "that Lorilei Swenson has worked her way through any issues concerning her sexual abuse as a teenager and that issue is not a matter of concern now or in the future." App. C 7. It made no mention of any danger Hannah would "fail to thrive."

allowed to "maintain contact" with their daughter. App. C 14.

The Termination Order did not identify any specific "findings of fact" as having been made pursuant to the "clear, cogent and convincing evidence" standard. However, responding to an objection on this score from petitioners' counsel, the court added those words to this summary statement in its conclusions of law:

> The elements of RCW 13.34.180(1), (2), (3), (4), (5) and (6) have been met by clear, cogent and convincing evidence. The elements of RCW 13.34.190 are also met. Therefore, pursuant to RCW 13.34.180 and 13.34.190, the parent-child relationship between the minor child and Brent Swenson and Lorilei Swenson should be terminated.

App. C 15.

Although the trial court was provided with a copy of the then-recent decision in *M.L.B. v. S.L.J.*, and a brief on the Fourteenth Amendment standards applicable to termination proceedings, it made no mention of them in either its oral or written decision. It denied petitioners' counsel's request that it specify the factual findings it was making under the "clear, cogent and convincing evidence" standard, and refused to define the "conditions" it found unlikely to change and the "proper care" it found petitioners unable to provide, in reaching its conclusion that "the elements" of RCW 13.34.180(5) were "met." Report of Proceedings at 1745-1747. It specifically declined to hold that those terms referred to "conditions" and a lack of "proper care" that would, themselves, support a dependency order filed in the first instance. Ibid.

3. The Decision of the Court of Appeals.

Petitioners' appeal challenged the termination order on both statutory and constitutional grounds.

Citing *Santosky* and *M.L.B.*, petitioners argued that the trial court had denied them due process in two major respects. First, they argued that "The State Was Not Required To Prove Its Case For Termination By "Clear, Cogent and Convincing" Evidence," because "The Trial Court Did Not Find The Factual Basis For Termination Proved By [That Standard]," "The Trial Court's Reliance on a Dependency Whose Basis No Longer Existed Reversed the Constitutional Burden Of Proof," and "The Trial Court Did Not Apply the "Clear, Cogent and Convincing" Standard To The Issue Of The Child's Best Interests." Appellant's Opening Brief, *In re Hannah S.*, at 51-63. In addition, analogizing to "void for vagueness" precedents from criminal law, petitioners argued that the trial court's refusal to define the crucial terms "conditions" and "proper care" denied them due process by allowing selective enforcement. Id. at 51-56; see also Appellant's Reply Brief at 27-32.

The Court of Appeals paid little attention to these constitutional arguments. It rejected the argument that the burden of proof had been misapplied, saying that this claim "misinterpret[ed] the dependency statute." App. A 10. In termination proceedings, it said, it is "not necessary to re-establish the original dependency at termination" and "the accuracy of the facts underlying the original dependency adjudication is not deemed critical" since "[t]he issue at termination is current unfitness" which is "implicitly established" if the statutory elements are found. Ibid. Regarding the burden of proof on the element of child's best interests, the Court of Appeals said it found no inconsistency between the trial court's ultimate conclusion

and its "expressed opinion that 'some contact between the child and her biological parents may be in her best interests as she continues to grow older'" App. A 17. Rejecting petitioners' vagueness arguments, it said a "statute is unconstitutional as applied only if the record shows the decision was arbitrary," and that the statutory "term 'conditions' clearly refers to present and continuing objective deficits in [petitioners'] parenting skills." App. A 12.

Petitioners moved for rehearing, which was denied without comment. Petitioners then petitioned the Washington Supreme Court for review, reiterating their federal due process challenges to the placement of the burden of proof and the vagueness of the statutory terms upon which the termination was based. The Petition for Review was denied. App. B.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED IN THIS CASE TO ENFORCE AND CLARIFY THE STANDARDS OF DUE PROCESS APPLICABLE TO STATE PROCEEDINGS LEADING TO THE TERMINATION OF PARENTAL RIGHTS.

Santosky v. Kramer, 455 U.S. 745 (1982) held that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Id.* at 748. The Court in *Santosky* based that holding on a recognition of the extent to which a parent faced with a termination proceeding "may be 'condemned to suffer a grievous loss.'" *Santosky v. Kramer*, 455 U.S. at 758, quoting *Joint Antifascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951).

The Court has since expanded upon *Santosky's* rule and held that, because of the stakes involved, a parent facing termination proceedings is due procedural protections greater than those required in any other type of civil proceeding.

> The object of the proceeding is "not simply to infringe upon [the parent's] interest ...but to end it"; thus, a decision against the parent "work[s] a unique kind of deprivation." *Lassiter* [*v. Department of Social Servs. of Durham Cty.*,] 452 U.S. [18], at 27 [(1981)] .... For that reason, "[a] parent's interest in the accuracy and justice of the decision ... is ... a commanding one." Ibid. ...
>
> ... [A] termination decree is "final and irrevocable." [*Santosky v. Kramer*, 455 U.S. 745, 759, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (emphasis in original). "Few forms of state action ... are both so severe and so irreversible." *Ibid.* [In *Santosky*,] [a]s in *Lassiter*, the Court characterized the parent's interest as "commanding," indeed, "far more precious than any property right." 455 U.S., at 758-759, 102 S.Ct., at 1397.

M.L.B. v. S.L.J., 519 U.S. at 118-19 (footnotes omitted).

Santosky's due process rule was also grounded in an understanding of the practical realities of parental termination proceedings (or, as they were called in New York at the time, "permanent neglect proceedings").

> Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. See *Smith v. Organization of Foster Families*, 431 U.S., at 835, n. 36. In appraising the

> nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, id., at 833-835, such proceedings are often vulnerable to judgments based on cultural or class bias. The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.
>
> The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options. Unlike criminal defendants, natural parents have no "double jeopardy" defense against repeated state termination efforts. If the State initially fails to win termination, as New York did here ... it always can try once again to cut off the parents' rights after gathering more or better evidence. Yet even when the parents have attained the level of fitness required by the State, they have no similar means by which they can forestall future termination efforts.

Santosky v. Kramer, 455 U.S. 462-64 (footnotes omitted). The facts and procedural history of this case suggest things have changed little since *Santosky*, at least in Washington state.

A. The Decision Below Directly Conflicts With *Santosky v. Kramer.*

The Washington termination statute and caselaw treats *Santosky's* constitutional proof standard as a meaningless incantation. Although the Washington statute recites the words "clear, cogent and convincing evidence," it limits and applies those words in a fashion that undermines and even reverses the constitutional burden of proof this Court has mandated in termination proceedings.

1. Washington Law Requires Parents to Prove Their Fitness to Keep Their Child.

By law in Washington, the threshhold "facts" which must be proved by "clear, cogent and convincing evidence" to terminate parents' rights to their children are matters of procedural history: that the child has been found dependent and has been removed from the parents' home for more than six months. See RCW 13.34.180(1)-(3), App. E 4. This presents a conundrum, because a dependency finding can be based on a mere preponderance of the evidence, and once removed from her home a child cannot be returned unless it is shown that "a valid reason for removal no longer exists." See RCW 13.34.130(5)(a), App. E 2.

Thus, in Washington, parents' rights can be terminated, as petitioners' were, by "clear and convincing" proof that they previously have been unable to prove that there is no reason to keep their child from them. This convoluted standard places the ultimate burden of persuasion on the parent; the requirement of "clear and convincing evidence" is mere window dressing. It would make no difference if the State's nominal burden of proof were absolute certainty: to say that it is "certain" or "clear" that another court has earlier found that a parent

failed to prove there was no "valid reason" for his child's continued removal does not change the fact the burden of proof was on the parent with respect to the only real factual determination made in the case.[7]

That is where the burden was clearly and quite explicitly placed in this case. By its terms and under the law, the termination order was based on the fact Hannah had not been returned home for more than six months and would not likely be anytime soon. See App. C 15; page 14, above. The fact Hannah had not been and would not soon be returned home was the result of her parents inability to disprove any "valid reason" for her continued removal. See App. D-1.

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[7]The Washington courts have tried to make the contradictions built into this statutory scheme disappear with the by declaring that the elements of RCW 13.34.180(1)-(6) add up to an where we said that RCW 13.34.180 "an implicit finding of current parental unfitness. " *In re K.R.*, 128 Wn.2d 129, 141-42, 904 P.2d 1132 (1995); see *In re J.C.*, 130 Wn.2d 418, 428, 924 P.2d 21 (1996); App A 10. This fiction cannot eliminate the real constitutional problems with this statute. For one thing, the presumption that present unfitness has been clearly established simply does not logically follow from the "fact" of a previous dependency adjudication made under a lower evidentiary standard and on facts that may well have changed. Cf. *Leary v. United States*, 395 U.S. 6 (1969) (presumption can be utilized in criminal law only if presumed facts more likely than not follow from proven facts). Second, a finding cannot both be "clear and convincing" and "implicit;" at the very least, a finding required to be made under an elevated standard of proof the finding must be stated directly. In the absence of a direct statement by the trial court that he found "present unfitness" at all, it can hardly be said that he found such unfitness "clearly and convincingly" proved, as *Santosky* requires.

If, as *Santosky* held, the Due Process Clause does not permit States to terminate parents' rights on the basis of a mere preponderance of the evidence, *a fortiorari* it cannot permit the burden to be placed on the parents to disprove all "valid reasons" their child might be kept from them. This aspect of Washington's law and the proceedings below thus conflict directly with *Santosky* itself to an extent that warrants this Court's intervention.

2. Washington Law Does Not Require "Clear and Convincing" Proof That Termination Is In The Child's Best Interest, A Statutory Element.

The law of Washington also ignores *Santosky* with respect to a key statutory prerequisite to an order terminating parental rights: a showing that "[s]uch an order is in the best interests of the child." See RCW 13.34.190(4), App. E 6. The Washington statute makes it clear that, unlike the procedural "facts" delineated in RCW 13.34.180(1)-(6), this element need not be proved by "clear, cogent and convincing evidence" or any particular standard of proof. Compare RCW 13.34.190(1)-(3), App. E 6.

The termination order in petitioner's case followed that distinction, reciting:

> The elements of RCW 13.34.180(l), (2), (3), (4), (5) and (6) have been met and proven by clear, cogent and convincing evidence. The elements of RCW 13.34.190 are also met.

App. C 15. This was no accident: the trial judge plainly had doubts about whether termination was in Hannah's best interests. one. As noted above, in his oral opinion the judge said it would be a "travesty" for petitioners not to

continue to be involved in their daughter's life. The written termination order added that "some contact between the child and her biological parents may be in her best interests as she continues to grow older..." App. C 14. Having said that, the trial court would have been hard pressed to find by "clear and convincing evidence" that it would be best for Hannah to have her birth parents permanently and completely excluded from her life; and it did not so find, because Washington law did not require it to do so.

The Court of Appeals below was presented with all this but cast it aside, saying only that the trial court "unequivocally recogniz[ed] that termination of parental rights is in the best interests of this child." App. A20. In light of the above, that is debatable; but more importantly it is irrelevant. A finding made by a preponderance of the evidence is not "equivocal"; but under *Santosky*, neither is it constitutional.

There is no apparent justification for Washington's statutory exclusion of this element from the "clear, cogent and convincing" evidence standard, which dates from the enactment of this statutory scheme in 1977, five years before *Santosky* was decided. See Wash. Laws 1977, Chap. 291 sec. 47. The Washington cases have never attempted to explain this disparity.[8] None of the principles underlying the decision in *Santosky* would explain it; in fact, the child's best interests would appear to be an issue particularly subject to "judgments based on cultural or class bias" and the influence of the State's "power to

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[8]The Washington cases have simply applied the lower standard of proof to this issue without comment. See *In re Ramquist*, 52 Wn. App. 854, 860, 765 P.2d 30 (1988); *In re A.V.D.*, 62 Wn. App. 562, 571, 815 P.2d 277 (1991).

shape the historical events that form the basis for termination." *Santosky v. Kramer*, 455 U.S. at 463.

Apparently recognizing this, other states which make a finding regarding the child's best interests a prerequisite to termination require that finding to be made under *Santosky's* heightened proof standard. See *In Re Maricopa County Juvenile Action No. JS-5209*, 143 Ariz. 178, 692 P.2d 1027, 1038 (1984); *Adoption of Kimberly*, 609 N.E.2d 73, 75 (Mass. 1993); *In re Elijah R.*, 620 A.2d 282, 284 (Maine 1993); *Matter of M.G.M.*, 654 P.2d 994, 997 (Mont. 1982);; *In re Gonzales v. Dept. of Human Resources*, 933 P.2d 198, 202 (Nev. 1997). Washington appears to be alone in its assumption that this factor is exempt from *Santosky's* constitutional rule.

The inconsistency between the law of Washington and other states in this regard, and the lack of any apparent justification for the exemption of this issue from *Santosky's* constitutional rule, are additional reasons review is called for here. Rule 10(c).

B. The Decisions Below Raise Important Unresolved Questions Regarding the Due Process Limits on Vagueness in Parental Termination Statutes.

Apart from the burden of proof issues directly controlled by *Santosky*, this case presents a question about the application of another type of due process rule to parental termination proceedings: the limits on statutory vagueness required to prevent arbitrary enforcement of laws impacting on fundamental rights.

The record of this case presents that issue clearly. Under the Washington statute, once the State proved the undeniable fact that Hannah had been found dependent and removed from petitioners' home, the crucial remaining

issue was the likelihood "the conditions" would soon be remedied. RCW 13.34.180(5), App. E 4. The trial court found they would not be, applying a statutory presumption "conditions" will not change if they stem from psychological problems which render a parent incapable of providing "proper care." RCW 13.34.180(5)(b), App. E 4; see App. C 15.

The Court of Appeals decision below rejected petitioners' challenge to the trial court's refusal to provide any definition of these vague statutory terms,[9] saying that the trial court's decision could be challenged on this ground "only if the record shows the decision was arbitrary," holding that it was not because "[t]he term "conditions" clearly refers to present and continuing objective deficits in B.S.'s and L.S.'s parenting skills." App. A 12.[10]

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[9]Because of the "evolution" of the State's allegations regarding petitioners' parental deficiencies, their counsel asked the trial court to define or specify what "conditions" it was considering in this regard and the "proper care" petitioners had to show themselves capable of providing; the trial court refused to do so. RP 1758-60. The trial court refused even to say whether it considered "proper care" to be a level of care sufficient to avoid a finding the child was dependent. Ibid.

[10]The Respondent Attorney General of the State of Washington similarly answered in its Brief below that the word "conditions"had no general definition but simply referred to "parental deficiencies viewed in the context of the care for the child at issue." Brief of Respondent at 24, In re Hannah S.

This, of course, misses a basic point of the constitutional requirement of reasonable statutory specificity: the need to protect against arbitrary and unequal judicial enforcement of statutes impinging on fundamental constitutional rights. Even where it gives adequate notice, a statute may be "impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)." *Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 1857 (1999) (plurality opinion). "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis...." See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

This Court has not had occasion to address directly the extent to which the constitutional prohibition of vagueness, which has largely developed in the context of the criminal law, applies to parental termination proceedings. In light of the Court's recent reiteration that such proceedings most closely resemble criminal prosecutions in the magnitude of their impact on individual liberty, *M.L.B. v. S.L.J.*, 519 U.S. at 120, and its recognition of particular risks of unequal enforcement such proceedings involve, *Santosky v. Kramer*, 455 U.S. at 463, it would appear clear that it does.

Lower courts generally have recognized that the vagueness principle does extend to termination proceedings. See Annotation, *Validity of State Statute Providing for Termination of Parental Rights* § 3(c)-(f), 22 A.L.R. 4th 774 (1981 and Supp. 1998), and cases there cited. The majority of these case have upheld necessarily

general statutory provisions governing termination issues against such challenges; yet a number, examining unadorned terms similar to those involved in this case, have held otherwise. See, e.g., *Alsager v. District Court*, 406 F.Supp. 10, 18 (S.D. Iowa 1975) *aff'd per curiam*, 545 F.2d 1137 (8th Cir.1976) (statute unconstitutionally vague for allowing termination where the parent "substantially and continuously or repeatedly refused to give the child necessary parental care and protection," or for "conduct ... detrimental to the physical or mental health or morals of the child"); *Roe v. Conn*, 417 F.Supp. 769, 780 (M.D. Ala. 1976) (finding that statutory definition of neglect circular and couched in terms such as "unfit" and "improper" that have no common meaning). *Davis v. Smith*, 583 S.W.2d 37, 42-44 (Ark.1979) (finding lack of adequate judicial guidelines in statute allowing termination where parents were unable to provide "proper home" for children).

The cases that have upheld termination laws against vagueness challenges, unlike the decision below, have recognized that due process requires a minimum level of control against arbitrariness as well as fair notice and have provided that control by construing general statutory terms to require actual harm or a threat of harm to the child's physical as well as emotional well being. See, e.g., *In re Maricopa County Juvenile Action No. JS-5209*, 692 P.2d at 1035; *In Re Doe,* 123 N.H. 634, 641-42, 465 A.2d 924, 929 (1983).

It was just such a construction petitioners' counsel asked the trial court to apply in this case--defining the unacceptable "conditions" and absence of "proper care" that justify termination under RCW 13.34.180(5) to include at least the level of "danger of substantial damage to the child's psychological or physical development" required to establish a dependency in the first place under RCW

13.34.030(4)(c). Report of Proceedings 1758-1760. The trial court refused to define these critical terms in this or any other fashion. As a result, it could terminate petitioners' relationship with their daughter without finding any danger that they would "damage" her, but only that they could not meet "her needs," "her emotional requirements" and give her "the best chance she can have of healthy maturation." See App. C 9-11. And also as a result, the Court of Appeals below could brush off petitioners' vagueness objections by saying that what the statutory language meant was nothing more or less than whatever the State had proved about the "deficits in [their] parenting skills." App. A 12.

If, as this Court has suggested, the liberty interests involved in parental termination actions are analogous to those in criminal prosecutions, see *M.L.B. v. S.L.J.*, 519 U.S. at 120, the constitution cannot permit this. See *Government of Virgin Islands v. Ayala*, 853 F.Supp. 160 (D.V.I. 1993) (striking down law making it a crime to create "situation where it is reasonably foreseeable that a child may suffer ... mental or emotional injury"). Certiorari should be granted here to determine whether parents' rights to a relationship with their natural children is a matter that can be delegated to judges "for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. at 109.

CONCLUSION

The petition for certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

In re the WELFARE OF H.S., A Minor.
B.S. and L.S., Appellants,
v.
Department of Social and Health Services, Respondent.

No. 17264-3-III.

Court of Appeals of Washington,
Division 3, Panel Nine.

March 9, 1999.

The Washington juvenile dependency statutory scheme permits termination of parental rights for deficiencies that are manifestations of chronic mental illness. B.S. and L.S. appeal the termination of their parental rights; both suffer from chronic mental illness. Their child H.S., now six years old, was removed from their home under an agreed order of dependency at the age of three months. The State sought termination when she was still in foster care after three and a half years. The court was persuaded that B.S. and L.S. unquestionably love H.S. But despite their best and sincerest efforts to resolve their parental deficiencies, B.S. and L.S. remained incapable of meeting the child's needs. They were unlikely to benefit from further services. And the child's need for a stable and permanent home required an end to the dependency.

In challenging whether clear, cogent and convincing evidence supports the court's findings of fact, B.S. and L.S. contend that necessary services failed to accommodate their handicap and their parental rights were terminated solely because of their disability, in violation of state and federal handicap- discrimination statutes. They also direct several due process challenges to basing the termination on facts

different than those in the original dependency. First, they contend that RCW 13.34.180(5)(b), which permits consideration of chronic, severe mental illness in termination proceedings, is unconstitutionally vague as applied. Second, they contend they were effectively deprived of notice of the State's allegations, and that the burden of proof was shifted by requiring them to prove that undefined "conditions" had improved. Finally, they contend that secondary interests of the child were erroneously given precedence over their primary constitutional parental rights.

Clear, cogent and convincing evidence supports the requisite statutory elements, so we affirm the decision of the court.

FACTS

H.S. was born on November 25, 1992. When she was three weeks old, her parents requested that she be placed in voluntary care, and in March 1993 she was placed in shelter care. She was made dependent in May 1993 as to B.S., and in June 1993 as to L.S. H.S. has not lived with her parents since that time. H.S. was placed in foster care with B.S.'s cousins, where she remains. They offer H.S. a permanent home.

B.S. and L.S. both suffer from chronic mental illness. Both were hospitalized with acute symptoms in October 1992, right before H.S.'s birth. L.S. is diagnosed as paranoid schizophrenic, and B.S. has been treated for severe depression. L.S. was hospitalized again shortly after H.S. was born. Both parents are currently diagnosed with schizophrenia, although L.S. disputes her diagnosis. Both parents are presently stabilized on medication as to acute symptoms.

The dependency arose primarily from concerns about lack of parent-child bonding and the baby's failure to thrive. The

dependency court found there was no parent capable of providing adequate care. The underlying findings were that L.S.'s rigid and obsessive thinking endangered the baby's health, her thinking was confused, and she could not respond to questions about the baby's daily care. She was uncooperative and resistant to support. The baby was below the fifth weight-for-length percentile. L.S. also experienced, but did not act on, strong sexual urges toward the infant. The records of the final dependency review and termination hearings contain exhaustive expert testimony that the problems giving rise to the dependency remain unresolved.

Ongoing problems include B.S.'s and L.S.'s inability to handle the stress of H.S.'s visits; rigid and concrete application of suggested parenting techniques resulting in inappropriate feeding, putting the child to bed too much and waking her up too soon; inability or unwillingness to respond to safety concerns; unwillingness or inability to accept suggested parenting skills; failure to pick up on the child's cues, or understand or address her needs; continued absence of bonding; and the father's tendency to remove himself, either physically or mentally. Throughout, B.S. and L.S. had regular supervised or monitored visitation. In May 1995, in an effort to reunite the family, visitation was up to 40 hours per week in B.S. and L.S.'s home. As on previous occasions, however, the length and frequency of the visits had to be reduced because of stress to both the parents and the child. At the recommendation of H.S.'s psychiatrist, the court limited visits to three hours a week at the visitation center.

B.S. and L.S. complied with services to the best of their ability, in spite of delaying or rejecting some services. They were referred to the Child Abuse Project (CAP), but were denied admission because the program was not deemed appropriate to their needs. B.S. and L.S. declined a second CAP referral.

The record includes extensive expert testimony that while the parents' capacity for improvement had reached a plateu, the child's condition was disintegrating. H.S.'s court-appointed guardian ad litem, after spending over 1,500 hours with the family, strongly urged termination for H.S.'s sake. Pamela Aden, engaged by B.S. and L.S. to facilitate reunification, also recommended termination. There was testimony throughout that the child's need for resolution, permanence and stability had become urgent. The recommendation was for permanent placement with the foster parents.

The court entered extensive written findings in the termination order of February 3, 1997. B.S. and L.S.'s petition for direct review to the Supreme Court was referred to this court.

DISCUSSION

The trial court has broad discretion to terminate parental rights if it finds that the elements of RCW 13.34.180(1) through (6) are established by clear, cogent, and convincing evidence and that termination is in the best interests of the child. Former RCW 13.34.190(1), (4); *In re Welfare of A.J.R.*, 78 Wash.App. 222, 228, 896 P.2d 1298, review denied, 127 Wash.2d 1025, 904 P.2d 1157 (1995). There are no more specific criteria because the facts of each case are unique. *In re Welfare of Aschauer*, 93 Wash.2d 689, 695, 611 P.2d 1245 (1980).

Former RCW 13.34.180 provides in part:

(1) That the child has been found to be a dependent child under RCW 13.34.030(2); and

(2) That the court has entered a dispositional order pursuant to RCW 13.34.130; and

(3) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the

parent for a period of at least six months pursuant to a finding of dependency under RCW 13.34.030(2); and
(4) That the services ordered under RCW 13.34.130 have been offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided; and
(5) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. In determining whether the conditions will be remedied the court may consider ...
....
(b) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future; and
(6) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home[.]

Clear, cogent and convincing evidence means that the ultimate fact in issue must be shown by substantial evidence to be "highly probable." *Krause v. Catholic Community Servs.*, 47 Wash.App. 734, 746, 737 P.2d 280, review denied, 108 Wash.2d 1035 (1987). We determine sufficiency of the evidence based on the record as a whole. *In re Dependency of C.R.B.*, 62 Wash.App. 608, 618, 814 P.2d 1197 (1991).

B.S. and L.S. do not dispute the first three elements the child was found dependent, the court entered a dispositional order, and the child has been removed for six months. The disputed elements are that all necessary and reasonably available services capable of correcting the parental

deficiencies within the foreseeable future have been offered or provided (RCW 13.34.180(4)); that there is little likelihood that conditions will be remedied in the near future because of severe and chronic psychological incapacity, and that there is no treatment that can render the parents capable of providing proper care for the child in the near future (RCW 13.34.180(5) and (5)(b)); that continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home (RCW 13.34.180(6)); and that termination is in the best interests of the child (former RCW 13.34.190(4)).

Findings: B.S. and L.S. contend generally that the court did not base its findings of fact on clear, cogent and convincing evidence. They assign error to all the substantive findings. Although the court states in its conclusions of law that RCW 13.34.180(1) through (6) were established by clear, cogent and convincing evidence, the order does not use the language "clear, cogent and convincing" in its findings. B.S. and L.S. argue that the findings merely parrot the statute and are not specific enough to support the conclusions. They do not assign error to particular findings or set forth the portions of findings which they assign error to as required by RAP 10.3(g) and RAP 10.4(c).

Assignments of error as to findings of fact must comply with RAP 10.3(g) and 10.4(c). We need not review challenged findings without citation to the record showing why the findings are not supported by the record. *In re Haskell*, 136 Wash.2d 300, 310-11, 962 P.2d 813 (1998). Given the extensive findings and the size of the record, it is impossible to review a blanket assignment of error to findings. *Morris v. Woodside*, 101 Wash.2d 812, 815, 682 P.2d 905 (1984). We therefore review only findings argued in the brief. *Valley View Indus. Park v. City of Redmond*, 107 Wash.2d 621, 630, 733 P.2d 182 (1987).

Services: RCW 13.34.180(4) requires that all reasonably available services ordered under RCW 13.34.130 (dependency review provisions) have been offered and provided. B.S. and L.S. contend this element was not established, because they were denied participation in CAP based solely on their mental illness, contrary to the Americans with Disabilities Act(ADA), 42 U.S.C. sec. 12132. [FN1]

> FN1. 42 U.S.C. sec. 12132 provides: "[N]o qualified individual with a disability shall, by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

Pursuant to former RCW 13.34.130(5)(b)(vii), the court ordered that CAP be offered. This order was conditional on the CAP program at some point deeming these parents eligible. CAP is a service of Spokane Mental Health, an independent, outside agency with its own eligibility criteria, which exists solely for the purpose of providing services to the mentally ill. The Department complied with the order and referred B.S. and L.S. to CAP twice.

The ADA was not violated. The ADA requires public entities to make reasonable accommodation for disabled persons. *A.J.R.*, 78 Wash.App. at 230, 896 P.2d 1298. The Act does not require public entities to provide the disabled with services not offered to others. 42 U.S.C. sec. 12132.

In addition to the denial by both B.S. and L.S. of the existence of any parenting problems, which is incompatible with successful treatment, CAP rejected B.S. and L.S. because of their long-term therapeutic needs and the length of time H.S. had already been out of the home. The admissions evaluator felt CAP would be able to recommend reunification only after longterm treatment. In the event H.S.

were returned, reintegration would require individual therapy and ongoing monitoring. CAP could provide neither. Because of their mental illness, ongoing treatment with Adult Outpatient Services was perceived as more beneficial than the "insight oriented group psychotherapy" offered through CAP. B.S. and L.S. refused the second CAP referral.

B.S. and L.S. are contending that they should be immunized from termination because the unavailability of a single offered service makes it impossible to prove RCW 13.34.180(4). But this case has been saturated with services from the beginning, [FN2] establishing RCW 13.34.180(4) by clear, cogent and convincing evidence. It would defeat the purpose of the entire dependency and termination scheme if a single unsuccessful referral were sufficient to preclude a finding that all necessary and available services had been offered.

> FN2. Before the dependency: Mental health services; First Stepps, Public Health Nurse; Spokane County Health Department social work services; Division of Children and Family Services (DCFS) social worker services; Paul Wert, Ph.D. (parents delayed); Vanessa Behan Crisis Nursery (parents refused); Spokane Child Abuse and Neglect Prevention Services (resisted); Parenting aide; Parenting classes; Edwina Skinner, in-home social worker; Bonnie Johnson, public health nurse. After dependency: Sex Offender Counseling; Carol Thomas, MA; Kathy Seeley of Spokane Consultants in Family Living; Parenting classes; Deborah Kelly, parenting/visitation training; Mildred Staley, guardian ad litem; James Mahoney, parent-child evaluation and visitation assessment/supervision; supervised visitation; Dr. Wert; Michael Manz, MD, psychiatrist; pharmaceutical, medical, transportation, financial services; Pam Aden (terminated by the parents when

she concluded reunification was not feasible); Joe Reeves, DCFS (services refused); Cerena Lauren; Pat James, MA, Spokane Mental Health Adult Services. Most of these providers had experience in working with the mentally ill.

Little likelihood conditions will be remedied: If all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future are offered or provided and the parental deficiencies are not substantially improved within 12 months of the dependency order, a rebuttable presumption arises that there is little likelihood that conditions will be remedied so that the child can be returned to the parents. RCW 13.34.180.

B.S. and L.S. mistakenly believe the "conditions" of RCW 13.34.180(5) are limited to the facts of the original dependency, and if termination is not based on these precise facts, it must be reversed. They argue that the only grounds for H.S.'s dependency were the baby's failure to thrive, the mother's inappropriate sexual impulses, and the acute nature of the mother's mental illness at that time. Because RCW 13.34.040 limits the court's jurisdiction to these grounds, they contend that when the court found all of these conditions had been resolved, it lost jurisdiction. *In re Welfare of Boatman*, 73 Wash.2d 364, 367, 438 P.2d 600 (1968). A proceeding begun on one ground and continued on another, without any opportunity to define and contest the new allegations, constitutes a fundamental deprivation of due process. *Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948); *In re Detention of Cross*, 99 Wash.2d 373, 384-85, 662 P.2d 828 (1983).

In the termination proceedings, they contend the "conditions" shifted to the alleged incapacity of the parents to provide for H.S.'s emotional and developmental needs. A dependency petition based on these "conditions," they argue, would have

failed. They urge that they were wrongfully deprived of rights to their child without a showing that they are currently sufficiently "unfit" to permit a declaration of dependency under RCW 13.34.130.

B.S. and L.S. misinterpret the dependency statute. It is not necessary to re-establish the original dependency at termination. *In re Dependency of J.C.*, 130 Wash.2d 418, 428, 924 P.2d 21 (1996). The review process results in repeated, updated findings of the dependency. Former RCW 13.34.130(5); *In re A.W.*, 53 Wash.App. 22, 28, 765 P.2d 307 (1988), review denied, 112 Wash.2d 1017 (1989). The language of the statute contemplates that circumstances will evolve between the dependency of an infant and termination involving a four-year-old child. For instance, RCW 13.34.145(1)(b) provides that "identified outcomes and goals of the permanency plan may change over time based upon the circumstances of the particular case." RCW 13.34.150 provides for changes to court orders "upon a showing of a change in circumstances[.]" Changed circumstances do not necessarily reflect resolution of the parental deficiencies giving rise to the dependency, even though the manifestations of the problems necessarily change over time.

For this reason, termination proceedings are not a relitigation of the dependency issues, and the accuracy of the facts underlying the original dependency adjudication is not deemed critical. *Krause*, 47 Wash.App. at 743, 737 P.2d 280. The issue at termination is current unfitness. *In re Dependency of K.R.*, 128 Wash.2d 129, 142, 904 P.2d 1132 (1995). If the elements of RCW 13.34.180 are proved, current parental unfitness is implicitly established. *J.C.*, 130 Wash.2d at 428, 924 P.2d 21; *K.R.*, 128 Wash.2d at 142, 904 P.2d 1132.

Jurisdiction: Insofar as B.S. and L.S.'s argument amounts to a challenge of subject matter jurisdiction, their contention

is without merit. The superior court has broad and comprehensive original jurisdiction unless jurisdiction is vested exclusively in some other court. Wash. Const. art. IV, sec. 6. Because of this broad constitutional grant of jurisdiction, exceptions are read narrowly. *Orwick v. City of Seattle*, 103 Wash.2d 249, 251, 692 P.2d 793 (1984). Unless the Legislature demonstrates an intent to limit jurisdiction, an act should be construed as imposing no limitation. *Burnside v. Simpson Paper Co.*, 66 Wash.App. 510, 517, 832 P.2d 537 (1992), *aff'd*, 123 Wash.2d 93, 864 P.2d 937 (1994).

Under the statutory dependency scheme, once dependency is established, the court retains jurisdiction until the child has been returned to the parents for six months. RCW 13.34.145(7). The court had subject matter jurisdiction.

Due process: Based on their misplaced insistence on identity of dependency and termination facts, B.S. and L.S. challenge the constitutionality of the statute, raising several due process issues.

Vagueness: B.S. and L.S. first contend that RCW 13.34.180(5) is unconstitutionally vague as applied. They contend the court refused to define the crucial statutory terms "conditions" and "proper care." Therefore, it was never specified what precise "conditions" had to change and what B.S. and L.S. could do to provide "proper care" so as to avoid termination. Because the conditions that led to the original dependency no longer existed and no other conditions justifying the dependency were ever alleged or found, B.S. and L.S. argue, the terms are unconstitutionally vague.

We presume statutes are constitutional. *K.R.*, 128 Wash.2d at 142, 904 P.2d 1132. The challenging party has the burden to prove otherwise beyond a reasonable doubt. *In re Dependency of C.B.*, 79 Wash.App. 686, 689, 904 P.2d 1171

(1995), *review denied*, 128 Wash.2d 1023 (1996). Since First Amendment freedoms are not involved, we consider only whether the statute is constitutional as applied. *C.B.*, 79 Wash.App. at 689, 904 P.2d 1171. In reviewing a vagueness challenge to a provision of RCW 13.34, the statute is unconstitutional as applied only if the record shows the decision was arbitrary. *In re Welfare of Aschauer*, 93 Wash.2d 689, 697-98, 611 P.2d 1245(1980) (vagueness challenge to the terms "proper parental care" and "proper maintenance"). The provisions of the statute are taken as a whole. *Id.* at 697, 611 P.2d 1245.

The court's written findings include specific language describing the nature of the parents' impairments and the effect on their parenting capabilities. The oral ruling discusses the specific testimony on which the decision relies. The term "conditions" clearly refers to present and continuing objective deficits in B.S.'s and L.S.'s parenting skills. The termination was based on present inability to correct the parenting problems that were litigated throughout the dependency. See *A.W.*, 53 Wash.App. at 29, 765 P.2d 307. As the court observed in denying B.S. and L.S.'s motion to dismiss, B.S. and L.S. were at all times informed of the nature of the issues and the Department's position thereon.

Notice: Due process requires notice that is "reasonably calculated, under all the circumstances," to apprise the parties of the pendency of the action and enable them to present a defense. *Duskin v. Carlson*, 136 Wash.2d 550, 557, 965 P.2d 611 (1998). B.S. and L.S. contend that they were denied due process because they did not have notice of the specific issues to be considered. *In re Welfare of Martin*, 3 Wash.App. 405, 410, 476 P.2d 134 (1970).

Notice must permit adequate preparation for the hearing. *Cross*, 99 Wash.2d at 384, 662 P.2d 828. The State complied with LJuCR 3.9 provisions governing notice for

review hearings. B.S. and L.S. had the Individual Service Plans which provided notice of the agency's position and plans with regard to developing issues. B.S. and L.S. do not dispute that these were filed, served and received. The issues underlying the termination are the same issues that were repeatedly litigated throughout: inability to meet the child's emotional and developmental needs, inability to respond outside the concrete, lack of flexibility and inability to react to new scenarios, and poor judgment.

Even if defective notice does implicate due process, it is harmless beyond a reasonable doubt when the complaining party subsequently participates in dependency review hearings and the termination adjudication. *A.W.*, 53 Wash.App. at 27, 765 P.2d 307.

Notice is a matter of personal jurisdiction, objection to which was waived when B.S. and L.S. repeatedly appeared and litigated these issues. *A.W.*, 53 Wash.App. at 26-28, 765 P.2d 307. Collateral attacks based on notice are disfavored, and CR 12(h)(1) waiver provisions are applied a fortiori to dependency proceedings. *A.W.*, 53 Wash.App. at 26, 765 P.2d 307. Moreover, failure to seek review of the resulting orders waives notice for all but the April 16, 1996 review proceedings.

In the hearing, B.S. and L.S. were apprised of and litigated the issues underlying the termination. The court was satisfied that B.S. and L.S. knew at every stage of the proceeding what the State's position was. Due process was satisfied by notice and an opportunity to be heard. *In re Welfare of Key*, 119 Wash.2d 600, 611, 836 P.2d 200 (1992), *cert. denied*, 507 U.S. 927, 113 S.Ct. 1302, 122 L.Ed.2d 691 (1993).

Burden of proof: B.S. and L.S. next contend that the court's reliance on a dependency whose basis no longer existed violated due process by reversing the constitutional burden of

proof, shifting the burden of persuasion with respect to facts the State is required to prove. *State v. Dault*, 19 Wash.App. 709, 713-14, 578 P.2d 43 (1978).

Termination must be based on current unfitness, as established by RCW 13.34.180(1) through (6). *K.R.*, 128 Wash.2d at 142, 904 P.2d 1132. The burden of proof is clear, cogent and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). B.S. and L.S. argue that after determining that the grounds for the dependency were resolved, the court improperly required them to prove the absence of continuing grounds and impermissibly presumed they were unfit when they could not.

The record does not support this contention. The State presented extensive evidence of current deficiencies. The court expressly found that the State established RCW 13.34.180(1) through (6) by clear, cogent and convincing evidence. The court also expressly states the appropriate burdens of proof were applied. The findings recite in detail the affirmative evidence on which the court relied in establishing current unfitness.

RCW 26.44.015(3): B.S. and L.S. next contend the State failed to establish RCW 13.34.180(5)(b), the presence of severe and chronic psychological incapacity or mental deficiency rendering them incapable of providing proper care with foreseeably available remedial treatments. They assert that they were found neglectful solely because of their mental illness in violation of RCW 26.44.015(3), which provides that no parent may be deemed abusive or neglectful solely by reason of handicap.

RCW 26.44.015(3) does not preclude termination. Mental illness or no mental illness, parental rights can be terminated if the parents lack the capacity to adequately nurture and care for the child. *Aschauer*, 93 Wash.2d at 694, 611 P.2d 1245.

The Swensons read RCW 26.44.015(3) as prohibiting consideration of any parental deficiency that might be a manifestation of mental illness. This is contrary to the intent of the statutory framework.

That RCW 26.44.015(3) does not supersede RCW 13.34.180(5)(b) to prevent termination of parental rights in the face of a parent's chronic, severe mental illness is evident from the fact that RCW 26.44.015(3) and RCW 13.34.180(5)(b) were enacted in the same legislation. Laws of 1993, ch. 412, sec. 11, enacted RCW 26.44.015(3). This same chapter at sec. 2 amended RCW 13.34, specifically adding RCW 13.34.180(5)(b) and expressly authorizing the courts to consider severe and chronic mental illness in termination proceedings. We construe original acts and amendments as one law passed at the same time. *In re Dependency of Ramquist*, 52 Wash.App. 854, 859, 765 P.2d 30 (1988), *review denied*, 112 Wash.2d 1006 (1989). The provisions of RCW 13.34.180(5)(b) were properly applied in these proceedings.

B.S. and L.S. argue that the court simply ignored RCW 26.44.015(3) and based both dependency and termination explicitly on their mental illness. This is simply not supported by the record. While the State is barred from arbitrarily removing children merely because the parents are mentally ill, the mentally ill are not immune from having their children removed if they are unfit. The court considers behavior manifesting mental illness within the totality of the circumstances. *In re Welfare of Hauser*, 15 Wash.App. 231, 235, 548 P.2d 333 (1976). A child should not be left in the custody of a parent whose mental illness renders the parent unable to understand or meet the needs of the child. *In re Welfare of Frederiksen*, 25 Wash.App. 726, 733, 610 P.2d 371 (1979), *review denied*, 94 Wash.2d 1002 (1980); *Aschauer*, 93 Wash.2d 689, 611 P.2d 1245. This is so even though the parent is stabilized on medication, if there is no

foreseeable likelihood of further improvement. *In re Moseley*, 34 Wash.App. 179, 186, 660 P.2d 315, *review denied*, 99 Wash.2d 1018 (1983). The parents' lack of insight into their condition may be considered. *Krause v. Catholic Community Servs.*, 47 Wash.App. 734, 747, 737 P.2d 280, *review denied*, 108 Wash.2d 1035 (1987).

There was conflicting testimony about the precise diagnosis, but it was not disputed that both parents were severely and chronically mentally ill. The court reminded the parties numerous times that not the label but the behavior was of concern.

The record is replete with testimony that B.S. and L.S. have not benefited from the available parenting services and are unlikely to improve in the foreseeable future. One recurring theme throughout the record is the mother's unwillingness to accept advice or suggestions. Even when willing, both parents are unable to adapt instructions given in a particular situation to analogous situations. They therefore remain inadequate to deal with everyday parenting challenges. They exhibit an inflexibility that leaves them unable to deviate from a planned activity when changing circumstances made it inappropriate. This is a common manifestation of schizophrenia. *In re Dependency of P.D.*, 58 Wash.App. 18, 23-24, 792 P.2d 159, *review denied*, 115 Wash.2d 1019, 802 P.2d 125 (1990). In *P.D.*, as in this case, the parent was unable to understand or pick up on a child's cues as to basic needs, and unable to generalize from specific instructions. Although the specific instances were minor, they added up to an inability to understand and respond to the child's basic needs. *Id.*

It was B.S.'s and L.S.'s behavior and H.S.'s reaction to them that were the conditions the court identified as parental deficiencies. Suicidal tendencies in the mother, extreme passivity in the father, rigid thinking, inability to put the

child's needs before their own, and inability to generalize information in both parents may be manifestations of mental illness. However, the cumulative testimony presented clear, cogent and convincing evidence of the inability of these parents to recognize and respond to their child's needs. These deficiencies are aggravated, not ameliorated, by medication. Even though the positive symptoms of hallucinations and delusions are controlled, their disease continues to have significant impact on these parents' daily functioning and capacity to tolerate stress.

The child: RCW 13.34.180(6) and former RCW 13.34.190(4) require that the record must support the conclusion that continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home and that termination is in the best interests of the child.

B.S. and L.S. contend that the court did not find by clear, cogent and convincing evidence that termination was in H.S.'s best interests. In support of this, they point to the court's expressed opinion that "some contact between the child and her biological parents may be in her best interests as she continues to grow older...."

The child's anticipated permanent placement is within B.S.'s extended family. The court did express the hope that there would be contact. Psychiatrist Michael Manz also expressed this hope. However, both expressed this sentiment in the context of unequivocally recognizing that termination of parental rights is in the best interests of this child.

B.S. and L.S. believe their most sacred rights have been subordinated to the State's shifting and amorphous view of the child's best interests, and that the length of H.S.'s dependency is the fault of the State. They argue that advocacy in the best interests of the child does not permit

any interest of the child to outweigh all rights of the parents. They contend that termination is justified only when the child is treated with cruelty or exposed to immoral or debasing conditions. *In re Welfare of Hudson*, 13 Wash.2d 673, 693, 126 P.2d 765 (1942).

Parents do have a fundamental liberty and privacy interest in the care and custody of their children, and termination should be allowed only for the most powerful reasons. *In re Welfare of Sego*, 82 Wash.2d 736, 738, 513 P.2d 831 (1973); *In re Welfare of A.J.R.*, 78 Wash.App. 222, 229, 896 P.2d 1298, *review denied*, 127 Wash.2d 1025, 904 P.2d 1157 (1995). But the court may not accommodate the parents' rights when to do so would ignore the basic needs of the child. *In re Welfare of Aschauer*, 93 Wash.2d 689, 695, 611 P.2d 1245 (1980). The child's right to basic nurturing includes "the right to a safe, stable, and permanent home and a speedy resolution of [dependency] proceedings." RCW 13.34.020; *In re Dependency of C.R.B.*, 62 Wash.App. 608, 615, 814 P.2d 1197 (1991). H.S. has been dependent and in foster care since she was three months old. She is now six years old. The alternative to termination is not to return H.S. permanently to B.S. and L.S., but to continue her dependency indefinitely. No child should languish for years in foster care. H.S. should be freed to move on with her life.

The termination orders are affirmed.

KURTZ, A.C.J., and KATO, J., concur.

APPENDIX B

SUPREME COURT OF WASHINGTON

In re the Welfare of	)	
	)	NO. 68087-6
H.S.,	)	
A Minor.	)	**O R D E R**
	)	
B.S. and L.S.,	)	C/A NO. 17264-3-III
	)	
Petitioner,	)	
v.	)	
	)	
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,	)	
	)	
Respondent.	)	
	)	

Department II of the Court considered this matter at its September 28, 1999, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 28th day of September, 1999.

/s/ Richard P. Guy
CHIEF JUSTICE

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

JUVENILE DIVISION

In re Termination of:	) NO. 96-7-002225-8
	)
HANNAH SWENSON	) FINDINGS OF FACT,
	) CONCLUSIONS OF LAW
(DOB: 11/25/92)	) AND ORDER OF
	) TERMINATION OF PARENT-
	) CHILD RELATIONSHIP
	) [x] CLERK'S ACTION
_____	) REQUIRED

THIS MATTER came on for hearing before the undersigned Judge of the Superior Court of Spokane County, Juvenile Division, on October 21, 1996, following the filing of a Petition for Termination of Parent-Child Relationship filed herein. Present before the court at the hearing were: Brent Swenson, the child's father; Lorilei Swenson, the child's mother; Tom May, the parents' attorney; Joseph Reeves, social worker on behalf of the Division of Children and Family Services (DCFS), Department of Social and Health Services (DSHS); Sylvia Glover, Assistant Attorney General, representing DSHS/DCFS; Mildred Staley, the child's court-appointed guardian ad litem; and Frank Hoover, the GAL's attorney.

The court having reviewed the file and records herein, the testimony and documentary evidence admitted, and having heard argument of counsel, now, therefore, makes the following:

FINDINGS OF FACT

I

Hannah Swenson is a minor child born on November 25, 1992. The child currently resides in Spokane County.

II

The mother of the minor child is Lorilei Swenson. She currently resides at Spokane, WA.

III

The father of the minor child is Brent Swenson. He currently resides at Spokane, WA.

IV

The child, Hannah Swenson, was found to be dependent under RCW 13.34.030(2)(now RCW 13.34.030[4]) (b) and (c) on May 3, 1993 as to the father and on June 16, 1993 as to the mother, under Spokane County Juvenile Court Cause No. 93-7-00117-0. The court entered a dispositional order pursuant to RCW 13.34.130 on May 3, 1993 as to the father and on June 16, 1993 as to the mother, under the same cause number. Subsequent review orders were entered, some contested and some stipulated.

The child has been removed from the custody of the natural parents for a period of at least six months pursuant to a finding of dependency under RCW 13.34.030(2). She has not been returned home since removal from the parents' home.

V

Services ordered under RCW 13.34.130 and all necessary services, reasonably available, capable of correcting parental deficiencies within the foreseeable future have been offered or provided. The services were appropriate to the parents' needs and consistent with any disabilities they suffered from mental disorders. Further, the Department in this case was willing to accept providers proposed by the

parents in several instances. The parents terminated services with some providers; this occurred prior to dependency when they wished to avoid intrusion or intervention and after dependency when they disagreed with the provider opinions. The parents have had the opportunity to engage in services over the course of more than 3½ years; there is little or no likelihood that further observation, assessment, services and litigation will result in any benefit to the parents, much less the child.

From June 1993 to June 1994 the DCFS case plan called for termination and adoption. Reunification did not become the case plan until June 1994, at which time DCFS adopted a concurrent plan. Always, the Department has in mind reunification/ concurrent planning regardless of permanent plan. Ms. Caryl Ann Herman became the social worker in June 1994. She had the Swensons' case considered at a Child Protective Team (an independent organization used for the purpose of assisting the State in making its determinations and decisions). CPT notes indicate that the direction of the people making comments was toward termination of parental rights [and no suggestion was made as to how reunification could be accomplished].

VI

A. The following services were offered or provided prior to the dependency in efforts to avoid removal of the child from the parents' home: Mental health services; First Stepps; Public
Health Nurse services in the home; Spokane County Health social work services in the home; DCFS social work services in the home; evaluation by Paul Wert, Ph.D.; Vanessa Behan Crisis Nursery Services; and Spokane Child Abuse and Neglect Prevention (SCAN) services including evaluation, a parenting aid, and parenting classes.

Edweena Skinner, social worker from Spokane Public Health, testified that she contacted the family before Hannah's birth upon referral from Sacred Heart Medical Center where both parents had been voluntarily hospitalized

in October 1992 for mental health problems. After working with the family in the home for several months, Ms. Skinner observed failure to thrive on the infant's part and was concerned regarding the mother's comments about sexual feelings toward Hannah. She reported her observations and concerns to Child Protective Services as a mandated reporter of child abuse and neglect.

Ms. Skinner found the family only able or willing to cooperate intermittently. In February 1993, the father instructed her not to return to the home.

Bonnie Johnson, Public Health Nurse, worked with the family before and after Hannah's birth. As she testified, the parents were stressed to a point where they could not provide adequate care for the infant. Both the public health nurse and Dr. Tomeo (the baby's pediatrician with whom Ms. Johnson was in contact) concluded that the baby suffered from failure to thrive in that her weight to height ratio dropped below the 5th percentile.

Lorelei and Brent Swenson both have cooperated extensively in what the court believes was the best of their ability in trying to resolve their problems so that they could have Hannah back on a permanent basis. However, the mother delayed engagement with Dr. Wert, canceling her first appointment, failing to show at her second appointment and appearing finally at her third appointment. The family resisted services with SCAN and requested that it close their file. The parents refused Vanessa Behan Crisis Nursery services. The DCFS social worker testified that the parents were only marginally amenable to her services.

B. The following services were offered or provided during the dependency: Parenting assessment and services at PAIR; parenting assessment and treatment with Pam Aden, MSW; counseling with a certified sex offender treatment provider; assessment and services from Carol Thomas, MA; assessment and services from Kathy Seeley, MSW, Consultants in Family Living; parenting classes; in-home parenting/visitation training from Deborah Kelley,

Mildred Staley (the child's guardian ad litem) and DCFS social workers; visitation assessment and supervision by James Mahoney, MSW; visitation supervision and services at The Visitation Center; updated psychological assessment with Dr. Wert for the mother; psychiatric assessment of the parents and child by Michael Manz, M.D.; updated psychiatric assessment; pharmaceutical assistance; transportation services; medical assistance; financial assistance; and DCFS social services.

C. Cerena Lauren (formerly Mary Lou Meckel) referred the parents to the Child Abuse Project (CAP) pursuant to their request via review hearing and on behalf of DCFS. She hoped that the intensive program would admit the parents and that it would be the answer to their service issues. The program did not admit the parents, noting that their issues made them inappropriate to the program and that they would need intervention more long-term than CAP provides because of their mental illnesses.

The parents proposed Pam Aden, MS, as a provider. She has extensive experience working with parents and children; her goal was to facilitate reunification. Although Ms. Aden was intent on facilitating reunification, she concluded after ten to twelve sessions that the parents could not fulfill Hannah's needs then or in the future. The parents terminated her involvement.

Deborah Kelley also provided an independent approach. She observed some parenting problems, including inappropriate use of naps and wake-ups, too much use of food to placate the child, and tendency to overstimulate the child even after she worked with the parents on the issue. Ms. Kelley, a mental health counselor and a foster parent, testified as follows: As a volunteer for DSHS, Ms. Kelley was asked by the DCFS social worker to observe Lorilei and Brent Swenson with their daughter, Hannah, during July 1994 for one time a week for three hours. Her job was to observe their parenting techniques, to observe their judgment, and to see if they were following through with parenting skills. She

again observed and assisted with parenting tips in 1995. She observed that both parents tended to seek each other's approval, verbal and nonverbal.

Ms. Kelley testified that both parents seemed to show good judgment around safety issues concerning Hannah. Overall, Ms. Kelley felt that the Swensons were competent in keeping Hannah safe and following through with parenting techniques they had learned.

Ms. Kelley's opinion at one time was that the Swensons could adequately parent with services. Although Ms. Kelley is sympathetic to Mr. and Mrs. Swenson and wanted reunification, she testified that the case should be put to rest and that it was not in Hannah's best interests to return her to her parents' custody.

DCFS social workers provided direct services. The parents at least twice directly refused these services from Joe Reeves, DCFS social worker. The parents were again referred to the Child Abuse Project by Joe Reeves pursuant to agreed review order. They did not choose to engage in the program. The parents did not accept an updated psychiatric assessment with a provider agreeable to all parties.

Spokane Mental Health Adult Services remain available to the parents. The parents are consistent (with a few minor exceptions) in attending medication monitoring. According to Faye Stephenson, LPN and case manager at the Evergreen Club (a day program for the chronically mentally ill at Spokane Mental Health) who testified as an advocate for the parents, they have failed to take advantage of Evergreen Program as much as they should over the last year. They have not taken as much advantage of the Evergreen Club in the last year, but they have had other things they were dealing with also, and they have not shown the symptoms of mental illness that they had in the past.

Pat James, MA, at Spokane Mental Health, Adult Services, has worked with the mother regarding issues of sex abuse. She testified that the mother has worked through these issues. Ms. James concluded that Lorilei Swenson has

worked her way through any issues concerning her sexual abuse as a teenager and that the issue is not a matter of concern now or in the future.

D. The child has received the following services: Medical/dental care; mental health services including weekly psychiatric services with Michael Manz, M.D., since mid-1996; relative care; and guardian ad litem services.

VII

The parents are unable to parent this child with little or no likelihood of change in the near and foreseeable future. There is little likelihood that conditions will be remedied so that the child could be returned to the parents in the near future.

A. Chronic mental health issues interfere with the parents' abilities to meet the child's physical, emotional and developmental needs. As William Bennett, M.D., (a psychiatrist who monitors the parents' medications at Spokane Mental Health and who was a witness for both the parents and the DCFS), testified, the parents maintain diagnoses of schizophrenia in adult services at Spokane Mental Health. He has some doubts about the diagnoses, but has not seen fit to change them or the parents' medication. The mother does not believe she suffers from schizophrenia.

The parents remain medicated with substantial amounts of Mellaril, an antipsychotic medication used in adults for control of the symptoms of schizophrenia; although some schizophrenics take larger doses of the drug than do the Swensons, the amount that they take would make a person without mental illness unable to function.

Mr. Swenson has also suffered from depression and has been treated with electroconvulsive therapy (ECT). Stress is a significant problem for both parents, and it becomes overwhelming at times for Mr. Swenson. He also appeared to have difficulty recalling incidents upon examination before this court. Mr. Swenson is a person who is "laid back." He is not one who pushes himself into conversations or activities and is content to sit back and

observe. However, the testimony (of Joe Reeves, DCFS social worker) also was that, as far as parenting is concerned, he seemed to have the ability to pick up on Hannah's cues, possibly better than Mrs. Swenson and either step in and take some action or suggest that Lorilei take some action.

Michael Manz, M.D., the psychiatrist ordered by the court to evaluate the parents and child, is medical director of the Child and Adolescent Department (psychiatric) at Sacred Heart Medical Center. He diagnosed both parents as schizophrenic based on history and presentation. Dr. Manz opined with reference to texts and treatises read into evidence that a child of two schizophrenic parents has a 37-40% chance of developing the disease. The parents own limitations will hinder them in addressing Hannah's developmental needs as she matures whether or not she develops schizophrenia, and their limitations will make recognition of and response to Hannah's emotional needs particularly difficult.

The parents pursued assessment with E. Clay Jorgensen, Ph.D., and Donovan Clark, M.D. Neither questions that the parents suffer from mental disorders, although both question the diagnoses of schizophrenia. Like Dr. Manz and Dr. Bennett, neither Dr. Jorgensen nor Dr. Clark has seen the parents in acute phases of their mental illnesses.

Although the parents' expert, E. Clay Jorgensen, Ph.D., opined that he was unsure that the parents' were properly diagnosed as schizophrenic he did not provide any certain alternative diagnoses.

Donovan Clark, M.D., is a board certified psychiatrist retained by the parents. He has had limited contact with Hannah but testified that he saw no distress during visits with the parents. Although he believes that the parents do not suffer from schizophrenia, he offered no differential or alternative diagnoses. He conceded that Mellaril is used in adults to treat psychotic symptoms. Dr. Clark was unaware or unaccepting of the statistic cited by other providers herein

and set forth in the psychiatric literature/learned treatises that children of two schizophrenic parents have a 37-40% chance of inheriting the disease. This calls into question his credibility with the court, causing the court to wonder why he made this statement or whether he is simply unaware.

Dr. Wert is the only evaluator herein to have seen the mother during an acute exacerbation of her mental illness. As set forth in his reports entered as evidence, Dr. Wert diagnosed the mother as suffering from major depression, recurrent, with psychotic features, and schizophrenia, residual type.

As family members, professionals and the parents testified, the parents have long histories of mental illness including psychiatric hospitalizations. The parents have taken psychotropic medications for the last several years.

Based on differences of opinion among the experts, the court does not find by clear and convincing evidence that either parent does or does not suffer from schizophrenia. The pragmatic implications of the parents' mental illnesses rather than the precise label applied are of concern here. Here, the parents' impairments preclude them from meeting the child's emotional and developmental needs to such an extent that no court would return the child to her parents' home throughout the course of the dependency. These inabilities continue to exist. Although the parents try to follow scripts they learn via parenting instruction, their mental illnesses manifest in a concrete inflexible approach to dealing with new scenarios. The parents lack problem-solving abilities and abilities to respond to new, unforeseen, unscripted problems. These are the daily course of parenthood, as scripts for each situation that will confront the parents do not exist.

B. Despite extensive visitation opportunities, reunification has not proved possible during the course of the dependency. The child suffers confusion in having parents who cannot meet her emotional requirements or establish clear boundaries. During the course of the dependency, expansions of visitation in duration and frequency could not

be tolerated by the child; visits had to be reduced by the court for the child's health, safety and welfare.

VIII

The continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. The child is entitled to a safe, stable, permanent home. She is entitled speedy resolution of these proceedings. Although resolution of this matter has not been speedy, the court does not fault either party in this regard because development of the case over time required further investigation and opportunities for participation by the parents.

The child cannot exist forever in the limbo of temporary care, however. As here, when the rights of the parents and the child conflict, the child's rights are paramount. She requires finality at this time.

A. The parents have not progressed sufficiently during the course of the dependency that they can meet the child's developmental and emotional needs over time. As Ms. Aden testified, the parents could not fulfill Hannah's needs when she worked with them with the intent to reunify and will be unable to do so as she gets older. Kathy Seeley, MSW, did not find the parents minimally adequate, particularly in that they would not be able to meet Hannah's increasingly sophisticated needs as she grew older.

B. As Caryl Ann Herman (DCFS social worker) and other witnesses testified, the parents are too concrete to cope with changing situations or needs on Hannah's part. They can learn a response to one situation but cannot apply it to a new one. The mother is unrealistic in her expectations of Hannah. The father tends to be overly passive and too placid to parent effectively. As Ms. Herman testified, the father expressed concern about having permanent placement of Hannah, recognizing problems he and the mother had in dealing with the difficulties of raising a child; Mrs. Swenson has been singular, however, in seeking return of the child home and does not express such doubts.

C. As testified by Cerena Lauren (formerly Mary Lou Meckel), now a professor at Eastern Washington University and previously the Swensons' DCFS social worker from June 1993 to July 1994, Mrs. Swenson was unduly rigid in a manner that interfered with her ability to meet Hannah's needs. Mr. Swenson expressed concern to her about his ability to parent and meet Hannah's needs; Mrs. Swenson did not.

D. As Joe Reeves, the current DCFS social worker since March 1995, testified, the father is so passive that he fails to push himself into conversations or activities with the child. He could pick up on Hannah's cues better than did the mother, however. Visits were not beneficial to the child's health, safety and welfare, in Mr. Reeves' opinion.

E. Finally, assuming that both parents are schizophrenic, the child has a 37-40% chance of developing schizophrenia as she gets older (with onset of symptoms typically in the late teens or into the twenties). She suffers from insecurity and anxiety now that require psychiatric intervention, in the opinion of Joe Reeves, social worker, and Michael Manz, M.D., the child's psychiatrist. A stable home is necessary to give Hannah the best chance she can have of healthy maturation.

IX

Based on the evidence adduced at the termination proceedings, this court agrees with the dependency court in its August 2, 1996 and April 26, 1996 findings and observes that Commissioner Valente's observations at that time are similar to the court's present observations.

The child was found dependent originally because she was abused and/or neglected and because no parent was capable of meeting her needs. The circumstances of the dependency evolved, as is the case in any dependency.

Here, the focus has shifted to inability of the parents to meet the child's needs. Reasons for removal continued to exist throughout the dependency, as adjudicated by various

judicial officers of this county's Superior Court. Although the parents have progressed in comparison to their issues at the time dependency was established, they appear to have reached a plateau of significant duration, have not made ongoing progress for the last year or more, and are unlikely to do so.

X

It is in the child's best interests that an order of termination be entered terminating the parent-child relationship between the child and her parents.

As Carol Thomas, MA, testified, the child is deeply stressed by involvement in two homes. She requires a single base and one caregiving environment rather than two families claiming her. According to Ms. Thomas, Hannah would be severely traumatized if she were removed from her current placement. Hannah's best interests require that she remain where she is primarily attached in the relatives' home.

As Dr. Manz testified, Hannah was deeply stressed when she had lengthy visits with her parents in their home. The ongoing stress of having no permanent home has resulted in somatic complaints and stuttering on Hannah's part. Dr. Manz testified that Hannah needs to settle now. He opined that Hannah's needs and the deficiencies of the parents taken together require that parental rights be terminated and Hannah be freed for adoption.

Mildred Staley, the child's court-appointed guardian ad litem, spent many hours with the birth parents, relative caretakers and Hannah (alone and in combination with her parents and relative caretakers). She has been the child's guardian ad litem for more than two years. Although reports indicate that the first guardian ad litem for the child was more inclined to recommend reunification, Ms. Staley did not share that opinion. She saw little or no progress in the parents during the time she has been appointed to the case. Rather, having observed for many hours during visits and having consulted with the professionals involved in the case, Ms. Staley recommended that the court grant termination of

parental rights. She opined that such was in Hannah's best interests as the parents were unable to meet Hannah's emotional, developmental or physical needs.

Clay Jorgensen, Ph.D., is a clinical psychologist who over the years has substantial and continuing involvement with children and parents of those children who are in need. He met with Lorilei and Brent Swenson. He reviewed files and reports as reflected in his testimony. He did an MMPI on the parents in 1993. He had contact with the parents at two different points during the process.

In 1993, Dr. Jorgensen's opinion was that the parents were rehabilitated; however, he felt they still would need a lot of help. On or about February 7, 1994, he suggested more visits. Visits were expanded. However, that did not work out and the visitations were substantially cut back again.

Dr. Jorgensen testified that removal of Hannah from her relatives' home would be traumatic to her and suggested alternatives including open adoption. Dr. Jorgensen opined that while Ms. Swenson was rigid, she had potential to parent with extensive services, but he noted the passage of time and opined that return would be difficult for Hannah. Dr. Jorgensen testified that it was of import that this matter not drag on. Dr. Jorgensen declined to opine in detail as to the child, as he has not been a provider for her and has not had extensive contact with her.

Dr. Clark was not in a position to opine about the child's best interests or the appropriateness of termination of parental rights in that he has not had adequate contact with the child to do so.

Mitch Swenson, Mr. Swenson's relative and one of Hannah's foster parents, testified the he has known Brent Swenson since childhood. He acknowledged that conflicts have arisen in the family since Brent Swenson's marriage to Lorilei Swenson and during Hannah's placement. Mitch Swenson testified as well that the family is close and that Brent Swenson will always be a part of it. He noted that

Hannah has been doing better since the visits have been reduced. Although recognizing that it does not have authority to order ongoing contact between the biological parents and Hannah, this court recommends that the family relationship be healed to an extent that Hannah can have ongoing, occasional contact with the biological parents and that she be called by her given name (Hannah).

XI

The court considered alternatives to termination of parental rights.

Open adoption is a matter requiring agreement of the parties (parents, prospective adoptive parents, guardian ad litem on behalf of the child, and agency). The fact that this matter (a contested proceeding on the State's petition to terminate parental rights) is before the court indicates that no such agreement has been reached. While the court recommends that the adoptive parents maintain contact between the child and her biological parents, it has no authority to order the parents or prospective adoptive parents to accept an open adoption. Further, although some contact between the child and her biological parents may be in her best interests as she continues to grow older, this factor cannot be used to delay permanence for the child indefinitely. This is especially the case given that reunification with the parents is not possible in the foreseeable future.

Guardianship is not appropriate for this child in that she needs a stable, permanent home; guardianship is by its nature impermanent. It is not appropriate for a child of this young age, especially in that her special needs make finality and permanence of pivotal importance for her.

XII

The child is not a member of a federally recognized Indian Tribe, thus, no notice is required.

XIII

The Soldier's and Sailor's Relief Act, 50 U.S.C. Sec. 501 et seq. does not apply to this proceeding.

From the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

I

The court has jurisdiction of the parties and subject matter of this action.

II

All parties were properly served with notice pursuant to statute and are properly before the court.

III

The elements of RCW 13.34.180(l), (2), (3), (4), (5) and (6) have been met and proven by clear, cogent and convincing evidence. The elements of RCW 13.34.190 are also met. Therefore, pursuant to RCW 13.34.180 and 13.34.190, the parent-child relationship between the minor child and Brent Swenson and Lorilei Swenson should be terminated.

IV

The presumption set forth in RCW 13.34.180(5)(a) is not herein alleged or established.

The presumption set forth in RCW 13.34.180(5)(b) is established.

V

The court has taken into consideration the applicable burdens of proof in making its determinations. Further, the court has considered the presumptions set forth under RCW 13.34 as well as references in the parents' brief to RCW 74.14 and to the Americans with Disabilities Act.

DATED this 3rd day of February, 1997.

/s/
JUDGE RICHARD SCHROEDER

ORDER

The court having made its Findings of Fact and Conclusions of Law and having found that the elements of RCW 13.34.180 and 13.34.190 have been met, and that the order of termination of the parental rights of Brent Swenson

and Lorilei Swenson is in the child's best interests, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that all parental rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support existing between the child and all parental interests of the above-named parents, shall be severed and terminated and Brent Swenson and Lorilei Swenson shall have no standing to appear at any further legal proceeding concerning the child.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the child is committed to the permanent legal custody, control and supervision of the Department of Social and Health Services, and thus, making the Department of Social and Health Services permanent legal custodian of the child. The Department shall have the authority to consent to the adoption of the child, the marriage of the child, the enlistment of the child in the Armed Forces of the United States, necessary surgical and all other medical treatment for the child and to consent to such other matters as might normally be required of the parent of the child.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the dependency review hearings for Hannah Swenson, Cause No. 93-700117-0, be stricken and that a permanent ward review hearing be set for April 22, 1997, 1:30 p.m., Spokane County Superior Court, Juvenile Division.

DATED this 3rd day of February, 1997.

/s/
JUDGE RICHARD SCHROEDER

Presented by:

/s/
SYLVIA GLOVER
Assistant Attorney General
WSBA #18285

[ ] Approved as to Form;
[ ] Notice of Presentment Waived:
/s/
FRANK HOOVER #10791
Attorney for Guardian ad Litem

Copy Received only T.P. May
TOM MAY #10798
Attorney for the Parents

APPENDIX D

Oral Decision of the Juvenile Court Commissioner
April 17, 1996

THE COURT: This is been a vigorously contested case. The case itself has created a problem, significant problem, for the health and welfare of this child, simply by virtue of its duration. It probably would have been better for both the child and the parents -- and the foster parents, for that matter -- to have reached closure on these issues a long time ago.

In dealing with the applicable statute, 13.34.130, in a context of a review hearing, the legislature has shifted the focus. Initially, in a dependency, the focus is, in terms of language, that the child shall, essentially, not be removed from the home unless the state shows (a), (b) and (c). In the context of a review hearing, that focus switches, and it says the child shall not be returned unless the court finds a valid reason for removal no longer exists. So, the question at this point is whether, simply stated, a valid reason for removal of this child from the parents' home still exists today.

Are things the same now as they were when the dependency started and the child was originally removed? I think the answer to that is no. Perhaps, initially, there were some questions that precipitated removal of the child. We haven't really focused on some of them. There were issues about the mother having thoughts of placing the child at risk for sexual abuse. Frankly, that, at present, does not constitute a risk to this child. And frankly, I don't see the case as being about that issue. There was initially question about failure to thrive of a three-month-old child. And I think the issues have completely changed there, also.

At the time the dependency started I think the parents were in acute distress in terms of their mental illness. There had been hospitalizations, and psychotic symptoms, and delusions, and hallucinations, and depression, such that the

household was in chaos, and the parents were seriously impaired in their ability to provide care for a young child. Initially, they were having trouble with the simplest of things; setting up a schedule to have three meals a day, to do the laundry on a regular basis, to clean the house; simple, day-to-day functions were overwhelming, and unable to be carried out. And the child could not be responsibly cared for under those circumstances. And I don't think there's any real question that the correct thing was done at the initial removal of the child from the parents' home.

Again, are the parents in the same situation they were at the beginning of this case? And the answer to that question is no. The experts, through this hearing today and yesterday, have been in conflict over their respective diagnoses and prognoses as to both the mother and the father. They both -- Well, each of the experts have agreed, however, that the parents each have a mental illness which affects their life, has affected their functioning seriously in the past, and potentially will impact their ability to function in the future.

There are certainly different degrees and different prognoses over the future years, depending on which analysis you subscribe to, Dr. Manz versus Dr. Clark. I think the parents have shown that there is serious reason to question some of the specific details of Dr. Manz' diagnosis of each of their mental conditions. It appears that Dr. Manz may have accepted uncritically a previous diagnosis of schizophrenia, and projected from that diagnosis a number of observations. It is certainly within the realm of possibility that Dr. Manz' observations were colored by this initial diagnosis. However, this does not negate Dr. Manz' analysis in any significant respect. It does indicate that this is not -- and by that, I mean, psychiatry is not an exact science. And there is room for reasonable trained professionals to disagree.

Neither Dr. Manz nor Dr. Clark has seen either of the parents in the acute phases of their distress. Both, are, in a sense, forced to rely on historical information that's provided to them. Dr. Bennett also indicates that the mother, in

particular, has improved over time in her functioning, and the diagnosis of schizophrenia initially arrived at by the Mental Health Center may in fact be a misdiagnosis.

The real issue, however, is not the label which we attach to either of the parents. Perhaps, looking at this from a more pragmatic standpoint, it's more important to determine how the mental illness manifests itself, and how it impacts each of the parents in their day-to-day functioning with regard to this child. The experts may continue to argue about their respective opinions and labels.

The court does find that the parenting skills and the parenting practices of the parents were initially impaired through their mental illness. There's never been any claim of intentional abuse of this child, and that certainly is not an issue in this case. No one would anticipate or expect that either of these parents would do anything to damage this child on an intentional basis. To the contrary, they have, in most respects, complied with the requests of the court along the way, and engaged in and benefited from services to the extent that they have been able.

If we look at just the basic parenting functions, if we break this down into its component parts in terms simple things -- preparing meals, cleaning a house, doing laundry, reading books to a child -- in many respects the parents, having stabilized their mental conditions, have made dramatic progress. The parents are now able to meet the basic day-to-day needs of this child in this respect. They can keep a home. They can clean a house. They can provide meals. They can do that within acceptable standards, at least to the level that it would not pose a serious risk of harm to this child.

The focus of the case, then, has really shifted from meeting basic, concrete physical needs of a child, to a rather complex emotional dilemma that confronts the court and the parties. Looking forward, serious questions are raised about where would we go from here in terms of parenting.

Parenting classes have been offered; the parents have attended; they've benefited: they've learned parenting skills.

A particular problem that the court has in this area is that -- I think the best way I could describe it would be to say that the parents, in good faith, will follow a parenting script that is provided for them by a specialist. They act in good faith. They -- Provided information on how to deal with a particular situation, they follow the script, and can get through a scripted scenario successfully. The difficulty is that one of the manifestations of the mental illness seems to be a sort of concrete, inflexible approach to dealing with new scenarios. There seems to be a lack of what I would have to describe as problem-solving, kind of spontaneous problem-solving ability. There is not a demonstrated ability to respond to unforeseen or new situations that have not been previously scripted for the parents. If you can identify a problem, you can give the parent the solution and they will implement it. On their own, the court does not see them encountering a new problem and, on their own, being able to arrive, necessarily, at the solution to that problem.

This is of particular concern because the course of parenting involves, on a day-to-day basis, constantly dealing with new scenarios and situations that a child confronts their parents with. No one knows with a child what is going to happen next. And it is impossible to prepare the parents with a script for every imaginable situation. Life is somewhat simpler at age three, and the court is particularly concerned, as time goes on, when life becomes more complex and more sophisticated, whether the parents can adapt and respond with answers to those more complex questions.

Another manifestation of the mental illness seems to be in the area, simply, of judgment, for lack of a better description, that the mother, in particular, seems to blur the boundaries between her role as a parent and a playmate to the child. And certainly acting in good faith, trying to do the right thing, engaging the child in activities, seems to inadvertently end up either monopolizing the activity, or

intruding on the child's activity, or reducing herself to more of a playmate for the child, and controlling a child activity to the point where it irritates the child and frustrates the child. There seems to be a lack of insight into the need of the child to have clear boundaries between who the parent is and who the child is, and what their respective roles are.

Another area that seems to be a manifestation of the illness of the parents is their inability to empathize with the child, and to adequately perceive the cues given off by the child and the specific needs of the child. There's a tendency to over-simplify things, and to be somewhat naive, about what has turned into very complex emotional issues confronting this child. The suggestion on the part of the parents that if the child is turned over to them that it would be a good idea to leave town and move to Ellensburg or Wenatchee, is, in my opinion, a dramatic disregard of the need of this child, to somehow come to terms with the fact that the child is attached to another family, essentially as her -- in her mind, her parents.

The court, in other contexts, in disputes over placement of a child, recognizes the concept of psychological parent. And one would have to conclude, in this case, that the foster parents are the psychological parents to this child. Remarkably, the biological parents seem to have no real understanding of this, and conceivably, if the child were placed with them, would create a serious risk, from an emotional standpoint, of not accommodating this child's needs for some sort of transition.

At this point the court would find that rather being in danger of physical needs going unmet, that the real risk to this child would be to the child's emotional development if returned home. There's been testimony that the parents cannot fully educate this child in terms of modeling behavior in the problem-solving area; that they can't necessarily educate this child in terms of abstract or complex thought. A child, even at age three, I think, is on a steep learning curve, and is learning things day by day at a furious pace,

and is very dependent upon the individuals that are providing care for them to be stimulated in the full range of human activities, emotional and intellectual. And there are serious concerns that, in this area, the parents may not be really up to fulfilling the child's needs for stimulation.

If returned home there would be potential confusion, and a risk to this child of, I think, developing very unclear boundaries about the role of parent and child. There's the potential for this child to become, in a sense, parentified, and to a certain extent this dynamic seems to already be manifesting itself, even with the visitation schedule that we have; that the child reverses roles with the parents, and essentially dictates -- improperly, in my opinion -- the outcome of certain decisions within the family. And it may be simple things like whether the family has waffles or pancakes, but there seems to be a reluctance on the part of the parents to draw firm lines about who decides what, and what a parent's role is and what the child's role is.

Perhaps the most serious issue is really the potential trauma of separation from the primary and psychological parents. If this case has been going on over three years, -- well, if there were 36 months, 33 of those would have been in placement with this other family. Everyone would agree that the child will be bonded to these foster parents. And uprooting this child would create a high risk special needs child, after all this litigation.

The special needs and risks to this child are of grave concern to the court. In order for this child to be returned home, it would have to successfully negotiate its way through this very serious trauma. It would need assistance from caregiving adults to do that. It would be a very sophisticated process. The parents have not shown to the court the sensitivity to the cues and needs of this child that would be required to assist the child in negotiating through this complex process. If it is not successfully negotiated, the entire, you know, future emotional development of this child could be seriously derailed and impaired.

At this point I think everyone would agree that the primary need is for finality. And perhaps it's correct at this point that the case proceed to a termination hearing and we get a decision one way other the other, you know, which way this case is going to go. In the meantime, it would make no sense to this court to uproot the child, and given all the impending risks, and return the child to the parents at this stage.

As indicated, the department has provided reasonable services. This case has been saturated with services from the beginning. I think they've been itemized correctly by Ms. Glover. I think the department has acted correctly in placing the child in the least restrictive placement, in a relative placement, in a family that has a history with this child, where if this placement needs to be permanent, the parents and child will still have access to one another. At present there's a continuing need for placement. I think the department has complied with the case plan. I think the parents have made substantial compliance in terms of participating in the various assessments and evaluations, numerous as they are. The visits have been attended on a very regular basis, with minor few exceptions.

The parents, as I indicated, have made dramatic progress since the filing of the dependency case, in terms of stabilizing their mental health situation. They have, however, reached a plateau, and we are no longer seeing continued progress. In terms of a target date, we would see, I suppose, the termination trial as an ultimate decision point as far as implementation of the state's proposed plan.

Assuming we maintain the dependency, we maintain the current placement, we need to arrive at a visitation arrangement. The court is concerned with the manifestations of stress on the part of the child, the child's expressed resistance to visitation on a regular basis, the observations of acting out on the child's part, of becoming irritable and petulant. And we even have furies of possible weight loss related to this stress. The court would set the visits at this

point, this late stage in the case, at twice per week, with one visit being longer -- a minimum of two hours -- and the other visit being shorter, up to one hour. The visits can take place at a location which would provide a maximum sense of security for the child, which apparently could be the visitation center. The court really can't order the foster parents to open their home. The parties are free to enter into negotiations to see if that would be workable; the court would have no objection to that location.

The parents should be required to continue in individual treatment at the Mental Health Center, to maintain on their medication. The department should offer services through the CAP program, if at some point the program deems these parents eligible. The only additional service, other than what has been previously ordered, would be the -- It may be helpful for the parents to have a more specific focus on their mental illness diagnosis and their medication regimen. It seems that the Mental Health Center has taken the path of least resistance, and not wanted to, as it was said, fix something that isn't broken. The parents are functioning at a -- on a reasonable plateau; they're not having any acute problems. Maybe everyone should be satisfied with that. It's possible that the parents might reach an even higher plateau if a psychiatrist approached the situation with an open mind and was willing to reconsider the medication regimen, and reevaluate their diagnosis. Dr. Bennett seemed to have an open mind toward that, and I wouldn't exclude him. But seems to me that that should be a directive, to examine closely the mental status, and their future treatment and medication regimen.

All right. That would seem to address most of the issues that have been raised. I assume, Ms. Glover, you'd be in charge of preparing an order?

APPENDIX E

Relevant Washington Statutes[1]

RCW 13.34.030(2) (1993)

"Dependent child" means any child:

(a) Who has been abandoned; that is, where the child's parent, guardian, or other custodian has evidenced either by statement or conduct, a settled intent to forego, for an extended period, all parental rights or all parental responsibilities despite an ability to do so;

(b) Who is abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child;

(c) Who has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development; or

(d) Who has a developmental disability, as defined in RCW 71A.10.020 and whose parent, guardian, or legal custodian together with the department determines that services appropriate to the child's needs can not be provided in the home. However, (a), (b), and (c) of this subsection may still be applied if other reasons for removal of the child from the home exist.

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[1]Washington's child dependency and parental termination statutes have been amended several times since the proceedings in this case--though not in any respect relevant to the questions presented. The versions of the statutes in this appendix are those in effect at the time of the relevant proceedings below.

RCW 13.34.130 (5) (1993)

Except for children whose cases are reviewed by a citizen review board under chapter 13.70 RCW, the status of all children found to be dependent shall be reviewed by the court at least every six months from the beginning date of the placement episode or the date dependency is established, whichever is first, at a hearing in which it shall be determined whether court supervision should continue. The review shall include findings regarding the agency and parental completion of disposition plan requirements, and if necessary, revised permanency time limits.

(a) A child shall not be returned home at the review hearing unless the court finds that a reason for removal as set forth in this section no longer exists. The parents, guardian, or legal custodian shall report to the court the efforts they have made to correct the conditions which led to removal. If a child is returned, casework supervision shall continue for a period of six months, at which time there shall be a hearing on the need for continued intervention.

(b) If the child is not returned home, the court shall establish in writing:

(i) Whether reasonable services have been provided to or offered to the parties to facilitate reunion, specifying the services provided or offered;

(ii) Whether the child has been placed in the least-restrictive setting appropriate to the child's needs, including whether consideration and preference has been given to placement with the child's relatives;

(iii) Whether there is a continuing need for placement and whether the placement is appropriate;

(iv) Whether there has been compliance with the case plan by the child, the child's parents, and the agency supervising the placement;

(v) Whether progress has been made toward correcting the problems that necessitated the child's placement in out-of-home care;

(vi) Whether the parents have visited the child and any reasons why visitation has not occurred or has been infrequent;

(vii) Whether additional services are needed to facilitate the return of the child to the child's parents; if so, the court shall order that reasonable services be offered specifying such services; and

(viii) The projected date by which the child will be returned home or other permanent plan of care will be implemented.

(c) The court at the review hearing may order that a petition seeking termination of the parent and child relationship be filed.

RCW 13.34.180 (1996)

A petition seeking termination of a parent and child relationship may be filed in juvenile court by any party to the dependency proceedings concerning that child. Such petition shall conform to the requirements of RCW 13.34.040, shall be served upon the parties as provided in RCW 13.34.070(8), and shall allege:

(1) That the child has been found to be a dependent child under RCW 13.34.030[(2)]; and

(2) That the court has entered a dispositional order pursuant to RCW 13.34.130; and

(3) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency under RCW 13.34.030(2); and

(4) That the services ordered under RCW 13.34.130 have been offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided; and

(5) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. In determining whether the conditions will be remedied the court may consider, but is not limited to, the following factors:

(a) Use of intoxicating or controlled substances so as to render the parent incapable of providing proper care for the child for extended periods of time and documented unwillingness of the parent to receive and complete treatment or documented multiple failed treatment attempts; or

(b) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future; and

(6) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home; or

(7) In lieu of the allegations in subsections (1) through (6) of this section, the petition may allege that the child was found under such circumstances that the whereabouts of the child's parent are unknown and no person has acknowledged paternity or maternity and requested custody of the child within two months after the child was found.

A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been offered or provided.

Notice of rights shall be served upon the parent, guardian, or legal custodian with the petition and shall be in substantially the following form:

"NOTICE

A petition for termination of parental rights has been filed against you. You have important legal rights and you must take steps to protect your interests. This petition could result in permanent loss of your parental rights.

1. You have the right to a fact-finding hearing before a judge.

2. You have the right to have a lawyer represent you at the hearing. A lawyer can look at the files in your case, talk to the department of social and health services and other agencies, tell you about the law, help you understand your rights, and help you at hearings. If you cannot afford a lawyer, the court will appoint one to represent you. To get a court-appointed lawyer you must contact: (explain local procedure).

3. At the hearing, you have the right to speak on your own behalf, to introduce evidence, to examine witnesses, and to receive a decision based solely on the evidence presented to the judge.

You should be present at this hearing. You may call (insert agency) for more information about your child. The agency's name and telephone number are (insert name and telephone number)."

RCW 13.34.190 (1996)

After hearings pursuant to RCW 13.34.110, the court may enter an order terminating all parental rights to a child if the court finds that:

(1) The allegations contained in the petition as provided in RCW 13.34.180 (1) through (6) are established by clear, cogent, and convincing evidence; or

(2) RCW 13.34.180 (3) and (4) may be waived because the allegations under RCW 13.34.180 (1), (2), (5), and (6) are established beyond a reasonable doubt; or

(3) The allegation under RCW 13.34.180(7) is established beyond a reasonable doubt. In determining whether RCW 13.34.180 (5) and (6) are established beyond a reasonable doubt, the court shall consider whether one or more of the aggravated circumstances listed in RCW 13.34.130(2) exist; and

(4) Such an order is in the best interests of the child.

Supreme Court, U.S.
FILED
MAR 31 2000
CLERK

(2)

NO. 99-1279

IN THE SUPREME COURT OF THE UNITED STATES

BRENT SWENSON AND LORILEI SWENSON,

PETITIONERS,

v.

WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION III

BRIEF IN OPPOSITION

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The respondent, Washington Department of Social and Health Services, respectfully requests that this Court deny the petition for a writ of certiorari in this case.

STATEMENT

Hannah Swenson was born November 22, 1992. She was first placed outside the home of the parents, Brent and Lorilei Swenson, under a voluntary placement agreement in December 1992. Pet. App. at A-2. The juvenile court placed Hannah in shelter care under a stipulated order signed by the parents and their attorneys, put on the record before the judicial officer, and entered March 16, 1993. Pet. App. at A-2.

Hannah was made dependent by Agreed Order of Dependency and Disposition entered May 3, 1993, as to the father, and June 16, 1993, as to the mother (who agreed to dependency partway through a trial on the allegations set forth in the dependency petition). Pet. App. at A-2. The court found Hannah to be dependent pursuant to Wash. Rev. Code § 13.34.030(2)(b) (abuse or neglect) and (c) (no parent capable).[1]

The dependency court made specific, concrete, and detailed findings documenting neglect of the baby's needs and the biological parents' inability to care for her, and it entered dispositional orders setting forth remedial services. The dependency findings included: Insufficient emotional stability on the biological parents' parts to meet Hannah's physical and emotional needs; thought disorders/mental illness in the biological parents precluding lack of adequate care for the child; lack of bonding with the baby; clinically verified failure to thrive on the baby's part, combined with

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[1] Wash. Rev. Code 13.34.020(2) has since been renumbered as (4) by 1994 Wash. Laws ch. 288, § 1. Wash. Rev. Code 13.34.020(2)(b) defined a dependent child as one who was abused or neglected by a person legally responsible for that child's care. Wash. Rev. Code 13.34.030(2)(c) defined a dependent child as one "[w]ho has no parent, guardian, or custodian capable of adequately caring for the child".

failure to feed the baby with sufficient flexibility to meet her nutritional needs; and inability or unwillingness to cooperate with providers sufficiently to remedy these problems.

Following the statutes then in place, the Department of Social and Health Services, Division of Family Services (DSHS/DCFS) developed a permanent plan.[2]

Under Washington's statutory provisions, the dependency and termination matters are separate proceedings. *Compare* Wash. Rev. Code § 13.34.030 (definitions of dependent child) *and* Wash. Rev. Code § 13.34.040 (dependency petition) *with* Wash. Rev. Code § 13.34.180 (separate petition and service for termination petition).[3] DSHS/DCFS's assigned social worker filed a petition for termination of parental rights October 27, 1993. The petition was filed because the biological parents were

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[2] As in effect at that time (prior to passage of the Adoption and Safe Families Act of 1997, P-L 10589, amending the federal child welfare law and moving cases through the child welfare system more quickly so as to ensure children do not languish in foster care), Wash. Rev. Code § 13.34.145 mandated that:

> "A permanency plan shall be developed no later than sixty days from the time the supervising agency assumes responsibility for providing services, including placement of the child, or at the time of a hearing under [Wash. Rev. Code §] 13.34.130, whichever occurs first. The permanency planning process continues until a permanency planning goal is achieved or dependency dismissed. The planning process shall include reasonable efforts to return the child home." Wash. Rev. Code § 13.34.145(1).

No dependency may be dismissed until the child has been returned home by court order and monitored there for six months. Wash. Rev. Code §§ 13.34.130(7)(a), .145(7); *accord* Pet. App. at A-11.

[3] Given that dependency and termination proceedings are separate in that they have separate purposes and elements, each requires separate notice via service of a petition and a summons. Wash. Rev. Code §§ 13.34.070, .180.

making little progress in extensive services, remained unable to care adequately for Hannah in their home, and were contemplating relinquishment. By the date of filing, Hannah had been out of her biological parents' home by court order for seven months.[4] She resided with relatives approved initially by the parents (where she remains today). Pet. App. at A-2. The petition for termination of parental rights was voluntarily dismissed by the state when the biological parents decided they wished to further pursue reunification and appeared to be making some progress. *See* Pet. App. at C-10 (finding by the trial court at the termination proceedings that "development of the case over time required further investigation and opportunities for participation by the parents").

The court ordered visitation as part of the initial dependency disposition and in the review orders. Numerous expansions occurred—based variously on discretion of the social worker and the child's guardian ad litem, stipulated court orders, and court orders subsequent to contested review hearings and motions. Pet. App. at A-3. Each time, visits were subsequently reduced by court order, based on combinations of the biological parents' stress from visits and

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[4] Hannah had not been adjudicated a dependent child for six months at the time the first termination petition was filed. The petitioners contend that a petition cannot be filed until a child has been out of the home for six months. Pet. at 8. In actuality, the statute contains no such prohibition. Rather, it provides that the agency may file a petition for termination of parental rights at any time following the establishment of dependency. Wash. Rev. Code § 13.34.145(10). The termination proceedings may not be held, however, until the parents have had six months under a dependency to remedy parental deficiencies, as the state must prove at the termination proceedings by clear, cogent, and convincing evidence:

> "That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency". Wash. Rev. Code § 13.34.180(3).

harm to the child's health, safety, and welfare. Pet. App. at A-3, C-9, C-10; Br. Opp'n App. A at 6a ¶ 1.10, 7a ¶ 2.2.

Throughout the dependency proceedings of more than three years duration, the court conducted regular reviews, many of them contested, at which the state re-proved grounds for dependency.[5] At all times the parents were represented by counsel, had full access to the court, were informed of the agency's position through individual service plans, and appeared as well as litigated at numerous dependency review hearings. Serious parental deficiencies persisted in the biological parents; the parents' progress or lack thereof was detailed by numerous judicial officers in their dependency review findings and upon determination of various motions brought by the parties. The initial problems identified by the court continued to manifest themselves throughout the dependency, although the parents had access to numerous services appropriate to remedy their deficiencies. Pet. App. at A-3, 4, 7, 12-13, 16-17 (deficiencies); Pet. App. at A-8, 9, 16 (services to parents); Pet. App. at A-7 ("denial by both [parents] of the existence of any parenting problems, which is incompatible with successful treatment"); Br. Opp'n App. A at 3a-6a ¶¶ 1.7-1.10.

DSHS/DCFS filed a second petition for termination of parental rights February 22, 1996. Reunification efforts (in the forms of services and visitation) continued under the

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[5] Petitioners rely heavily on commentary from the trial court's oral decisions in their arguments to this Court. These are taken out of context and were superseded by the written orders. Pet. App. C (oral decision not incorporated into the trial court's written findings, conclusions, and order); Br. Opp'n App. A (written order incorporated the oral opinion only to the extent not inconsistent with the written findings). Even if the detailed, written decisions were deemed ambiguous, the dependency and termination court's oral opinions may be used to supplement or amplify, but not to contradict, their written decisions. *Lakeside Pump & Equip., Inc. v. Austin Const. Co.*, 89 Wash. 2d 839, 843 n.1, 576 P.2d 392 (1978); *In re Marriage of Curran*, 26 Wash. App. 108, 611 P.2d 1350 (1980).

dependency at all times until the trial court conducted the termination proceedings. The parents engaged in several contested hearings at dependency reviews and upon motions. The parents "knew at every step of the proceeding what the state's position was". Pet. *App. at A-13.*

After several days of trial in October 1996, the trial court terminated the biological parents' rights to Hannah. It made extensive findings regarding all elements of Wash. Rev. Code §§ 13.34.180-.190 in its written order entered February 3, 1997. Pet. App. at A-13; Pet. App. C.

REASONS WHY THE PETITION SHOULD BE DENIED

This case concerns, at base, the petitioners' beliefs that the trial court erred in its factual determinations and misapplied the law. The petitioners attempt to raise to constitutional magnitude what is essentially a dispute about the sufficiency of the evidence to support the trial court's findings of fact. There is no reason for the Court to grant this petition.

A. Washington Requires Parental Unfitness Be Established By Clear, Cogent, And Convincing Evidence As Set Forth In *Santosky v. Kramer*

1. Washington Requires Clear, Cogent, And Convincing Evidence

Petitioners claim that Washington law conflicts with *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982), which requires a clear and convincing standard of proof to terminate parental rights. Pet. at 20-22. This claim is inaccurate. Wash. Rev. Code § 13.34.190(1) provides that the allegations under Wash. Rev. Code § 13.34.180(1)-(6) contained in a petition seeking to terminate parental rights must be established by "clear, cogent, and convincing evidence". Pet. App. E-6.

Wash. Rev. Code § 13.34.180 sets out the factors that must be established by "clear, cogent, and convincing evidence" to terminate parental rights. The first three elements are historical facts that must be established. First, the state must prove that "the child has been found to be a dependent child under [Wash. Rev. Code §] 13.34.030(4)". Wash. Rev. Code § 13.34.180(1).[6] A "dependent child" is one who as been abandoned, abused, neglected, or who has no parent, guardian, or custodian capable of adequately caring for the child. Wash. Rev. Code § 13.34.030(4).[7]

Second, the state must prove that "the court has entered a dispositional order pursuant to [Wash. Rev. Code §] 13.34.130" regarding placement and providing remedial services and visitation. Wash. Rev. Code § 13.34.180(2). The services' purpose is to enable the parents to resume custody of the child. Wash. Rev. Code § 13.34.130.

Third, the state must prove that "the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency under [Wash. Rev. Code §] 13.34.030(4)". Wash. Rev. Code § 13.34.180(3).

Thus, the state must begin by establishing that the child has been declared dependant; that a dispositional order has been entered and that the child has been removed from custody of the parents for at least six months under a dependency. After these historical facts are established, the state must prove the remaining three factors which go the need to terminate parental rights.

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[6] Wash. Rev. Code § 13.34.030(4) was previously Wash. Rev. Code § 13.34.030(2), but was renumbered by 1994 Wash. Laws ch. 288, § 1.

[7] Renumbered from Wash. Rev. Code § 13.34.030(2) by 1994 Wash. Laws ch. 288, § 1.

Forth, under Wash. Rev. Code § 13.34.180(4), the state must prove that all dispositional services ordered at the initial dispositional hearing and at subsequent review hearings as well as "necessary services reasonably available" have been offered or provided.

Fifth, the state must prove that "there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future". Wash. Rev. Code § 13.34.180(5). The statute lays out nonexclusive factors that may be considered by the court including: "Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time". Wash. Rev. Code § 13.34.180(5)(b).

Sixth, the state must prove that "continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home". Wash. Rev. Code § 13.34.180(6).

Each of these factors must be established by "clear, cogent, and convincing evidence". Wash. Rev. Code § 13.34.190(1). Washington interprets the "clear, cogent, and convincing" standard in a manner consistent with *Santosky*, in requiring that the state show the six factors are "highly probable". *E.g.*, *In re K.R.*, 128 Wash. 2d 129, 141-42, 904 P.2d 1132 (1995); *Krause v. Catholic Comm'ty Servs.*, 47 Wash. App. 734, 740, 737 P.2d 280, *review denied*, 108 Wash. 2d 1035 (1987). Washington law conforms exactly to the requirements in *Santosky*.

2. Petitioners' Alleged Conflict With *Santosky v. Kramer* Is Based On A Misstatement Of Washington Law

Petitioners recognize that Washington law requires "clear, cogent, and convincing evidence". Pet. at 20. Despite this fact, they claim Washington violates the *Santosky* standard. Petitioners focus their argument on the

historical factor in Wash. Rev. Code § 13.34.180(1) that a dependency has been established. Petitioners note that a dependency finding can be based on a preponderance of the evidence and that the child shall not be returned home unless the court at a review hearing finds that a reason for removal no longer exists. Pet. at 20. From these facts, petitioners draw the conclusion that under Washington law a parent's rights can be terminated by "clear and convincing proof that [the parents] previously have been unable to prove that there is no reason to keep their child from them". Pet at 20.

This argument misstates Washington law. Parental rights cannot be terminated just because the child is dependant and has not returned home. The state must also prove the second, third, fourth, fifth, and sixth factors. The state must also prove that a dispositional order has been entered and that the parents have had at least six months under a dependency to remedy parental deficiencies. The state must prove that the services required in the dispositional order and review orders, as well as other necessary services, have been offered or provided. The state must prove that there is little likelihood that conditions will be remedied so that the child can be returned to the home in the near future. The state must prove that continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. Wash. Rev. Code § 13.34.180(4)-(6).

Wash. Rev. Code § 13.34.180(1) provides protection against arbitrary termination of parental rights, based on less than enduring deficiencies. Read together with Wash. Rev. Code § 13.34.180(2) and (3) (which are unchallenged by the petitioners), Wash. Rev. Code § 13.34.180(1) requires that a dependency be established and that the parents be part of a formal remedial process for at least six months prior to involuntary termination of parental rights. *In re A.W.*, 53 Wash. App. 22, 30, 765 P.2d 307 (1988); *accord Krause*, 47

Wash. App. at 745; *In re Darrow*, 32 Wash. App. 803, 649 P.2d 858, *review denied*, 98 Wash. 2d 1008 (1982).

Petitioners also misstate the reason for the termination in this case. According to petitioners, the termination order was based on the fact "Hannah had not been returned home for more than six months and would not likely be anytime soon". Pet. at 21. This is not accurate. The record herein is replete with evidence of parental unfitness considered during the lengthy trial on the termination petition, adopted by the trial court in its findings of facts and reviewed by the Court of Appeals in its decision. Pet. App. A, C; Br. Opp'n App. A (review findings, conclusions, and order references by the trial court in its termination findings). The parents' basic deficiencies remained the same over the years of the dependency (with limited progress made through remedial services), but changed in their precise manifestations as the child's needs evolved from her infancy through her years as a toddler to those of a pre-schooler. Pet. App. at A-2 to A-5, 12-14, 16-17; Pet. App. C; Br. Opp'n App. A at 2a-6a..

The trial court did not assume or imply that the mere fact of the child's ongoing dependency established the whole of Wash. Rev. Code § 13.34.180. Rather, the trial court ruled that it need not retry the initial dependency (years after the fact) to find that DSHS/DCFS proved Wash. Rev. Code § 13.34.180(1).

The logic behind this determination is that the question posed by Wash. Rev. Code § 13.34.180(1) is a simple one: Was the child made dependent? It is indisputable that Hannah was found dependent. The certified copies of the dependency findings, conclusions, and orders admitted as evidence at the termination proceedings established most basically (beyond the testimony of several witnesses, including the parents themselves) that dependency was established. In turn, Wash. Rev. Code § 13.34.180(1)

was thereby proven.[8] *E.g.*, *In re J.C.*, 130 Wash. 2d 418, 428-29, 924 P.2d 21 (1996); *In re K.R.*, 128 Wash. 2d at 141-42, 145-46; *In re A.W.*, 53 Wash. App. at 30.

While the initial dependency need not be re-established at the termination proceedings, evidence of current parental unfitness is required nonetheless to support termination of parental rights in Washington. *In re J.C.*, 130 Wash. 2d at 428-29; *In re K.R.*, 128 Wash. 2d at 141-42. Wash. Rev. Code § 13.34.180(1) cannot be viewed in a void. Rather, current parental unfitness is established by proving *all* of the elements of Wash. Rev. Code § 13.34.180. In requiring that each of the elements of Wash. Rev. Code § 13.34.180 be proven by clear, cogent, and convincing evidence, Washington meets the requirements of *Santosky*.

3. The Lesser Burden Of Proof To Determine The Best Interest Of The Child Is Consistent With *Santosky v. Kramer*

The state has proven that a parent is unfit when it establishes the six factors in Wash. Rev. Code § 13.34.180(1)-(6) by clear, cogent, and convincing evidence. The court must make one additional finding, however, before

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[8] The parents did not precisely challenge Wash. Rev. Code § 13.34.180(1) previously in their appeal of the termination order. Pet. App. at A-5. Notably, they stipulated to the initial dependency findings, conclusions, and orders. *See Krause*, 47 Wash. App. at 742 n.4 (commentary on the significance of an agreed order of dependency). Additionally, the parents stipulated to several dependency review orders and failed to appeal others—each of those reviews finding that the child remained dependent under the definitions set forth in Wash. Rev. Code § 13.34.030; the review process resulted in repeated, updated findings of dependency. Pet. App. at A-11 (citing *In re A.W.*, 53 Wash. App. at 28); Br. Opp'n App. A (review order similar to others entered in this matter in that all included updated findings of dependency). Had the parents wished to do so, the time to appeal matters connected with the dependency proceedings was during the dependency. *In re K.R.*, 128 Wash. 2d at 142 n.7; *In re Chubb*, 112 Wash. 2d 719, 725, 773 P.2d 851 (1989).

it terminates parental rights. The court must determine that an order terminating parental rights "is in the best interests of the child". Wash. Rev. Code § 13.34.190(2). The clear, cogent, and convincing evidence standard does not apply to this finding. Petitioners claim that the burden of proof regarding "best interests" violates *Santosky*. Pet. at 22-24.

Santosky does not support petitioners' argument. In *Santosky*, this Court distinguished between the factual determination of parental unfitness and the disposition of the child under the "best interest of the child" standard. Under the New York statutes in *Santosky*, the "State bifurcates its permanent neglect proceeding into 'fact-finding' and 'dispositional' hearings. At the factfinding stage, the State must prove that the child has been 'permanently neglected' .... The Family Court judge then determines at a subsequent dispositional hearing what placement would serve the child's best interests." *Santosky*, 455 U.S. at 748 (citation omitted). This Court ruled that the fact finding hearing to determine parental unfitness is not intended to balance the interest of the parent and child to determine what is in the child's best interest. According the Court:

> "At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge. *See* Fam. Ct. Act § 631 (judge shall make his order 'solely on the basis of the best interests of the child,' and thus has no obligation to consider the natural parents' rights in selecting dispositional alternatives). But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship Thus,

> at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures." *Santosky*, 455 U.S. at 760-61 (footnote omitted).

The determination of parental unfitness requires the high standard of proof of clear, cogent, and convincing evidence to ensure protection of the parents' liberty interest in their relationship with their child. Once parental unfitness has been established, a lesser standard of proof is constitutionally permissible to determine the disposition of the child.

Petitioners misconstrue the burden of proof question, as it applies to the "child's best interest" standard of Wash. Rev. Code § 13.34.190, because they misconstrue the purpose of Wash. Rev. Code § 13.34.190. In reality, this section is a protection for parents, providing the trial court a reason to preserve parental rights even if the parents are unfit, if termination of the rights is not in the child's best interests. A more complete citation to the language of *In re Ramquist*, 52 Wash. App. 854, 765 P.2d 30 (1988), *review denied*, 112 Wash. 2d 1006 (1989), than provided by the petitioners illuminates the issue:

> "The burden of proof on the issue of [the child's] best interests is not "clear, cogent, and convincing" evidence, as it is for the elements of [Wash. Rev. Code §] 13.34.180(1)-(6). *See* [Wash. Rev. Code §] 13.34.190. Rather, [Wash. Rev. Code §] 13.34.190(2) gives the trial court discretion not to grant termination even when the petitioner establishes the elements of [Wash. Rev. Code §] 13.34.180(1) -(6) with the requisite degree of proof. *See Santosky v. Kramer*, 455 U.S. 745, 769, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (state must prove parental unfitness by clear and

> convincing evidence); *In re Sego*, 82 Wash. 2d 736, 739, 513 P.2d 831 (1973) (same)." *In re Ramquist*, 52 Wash. App. at 861.

In sum, because Washington's "best interest" standard is not an element of unfitness, it need not be proven by clear, cogent, and convincing evidence.

Under Washington's statutory provisions, and as applied here, Hannah's "best interests" were not decided as an element of the unfitness determination. However, the court could not justify preservation of the relationship after several years of out of home placement in the face of the parental deficiencies subject to no further remedy, combined with the child's need for permanent placement. Pet. App. at C-3. After three and one-half years of services, there was "little or no likelihood" that further intervention would benefit the parents, "much less the child". Pet. App. at C-3.

Furthermore, Hannah was unable to tolerate extensive contact with her parents. Pet. App. at C-9, 10. In 1995, visits were increased to forty hours per week in the parents' home, monitored. Pet. App. at A-3. As was the case in all other expansions of visitation in this case, neither the parents nor the child were able to maintain this schedule due to anxiety. Pet. App. at A-3. Additionally, "[t]he ongoing stress of having no permanent home . . . resulted in somatic complaints and stuttering on Hannah's part." Pet. App. at C-12. She suffered from having parents who could "not meet her emotional requirements or establish clear boundaries". Pet. App. at C-9. Ultimately, Hannah required weekly psychiatric care. Pet. App. at C-7, 11. "At the recommendation of [her] psychiatrist, the court limited visits to three hours per week at the visitation schedule." Pet. App. at A-3. As did other providers who worked with Hannah, her psychiatrist opined that her best interests required

termination of parental rights and adoption. Pet. App. at C-12, 13.[9]

"Courts are always reluctant to deprive parents of rights with respect to their children, and it is particularly sad when the parent cares for the child and desires to be a good parent, as appears to be the case here." *In re Aschauer*, 93 Wash. 2d 689, 695, 611 P.2d 1245 (1980). Indeed, the trial court's written decision and its oral commentary indicate it did not take its decision lightly. The court recognized, however, that continuity and stability had become imperative for Hannah. Pet. App. at C-12, 13-14. In so recognizing, the trial court did not make any finding indicating that current contact would benefit the child.[10] It found that "although some contact between the child and her biological parents may be in her best interests as she grows older, this fact cannot be used to delay permanence indefinitely. This is especially the case given that reunification with the parents is not possible within the foreseeable future." Pet. App. at C-19. Indeed, Hannah requires finality at this time, "as

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[9] As the Court of Appeals noted upon review:

> "The record includes extensive expert testimony that while the parents' capacity for improvement had reached a plateau, the child's condition was deteriorating. [Hannah's] court-appointed guardian ad litem, after spending over 1,500 hours with the family, strongly urged termination for [her] sake. Pamela Aden, engaged by [the parents] to facilitate reunification, also recommended termination. There was testimony throughout that the child's need for resolution, permanence and stability had become urgent. The recommendation was for permanent placement with the foster parents." Pet. App. at A-4.

[10] So long as the elements of Wash. Rev. Code §§ 13.34.180-.190 are established, termination of parental rights is not barred even by a finding that continued contact would benefit the child. *In re A.V.D.*, 62 Wash. App. 562, 572-73, 815 P.2d 277 (1991).

she cannot exist forever in the limbo of temporary care". Pet. App. at C-10.

B. There Are No Important Unresolved Questions Regarding Due Process Limitations On Vagueness In Parental Termination Statutes

Petitioners claim this case presents important unresolved questions regarding due process limitations on vagueness in parental termination statutes. Pet. at 24-28. This argument lacks merit. Petitioners point to Wash. Rev. Code § 13.34.180(5)(b), which requires that the state prove by clear, cogent, and convincing evidence:

> "That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. In determining whether conditions will be remedied the court may consider, but is not limited to, the following factors:
>
> ". . . .
>
> "(b) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care to the child for extended periods of time, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care in the near future". Wash. Rev. Code § 13.34.180(5).

A statute cannot reasonably list each of the ways that a parent might behave so as to support termination of parental rights. Any such attempt risks creation of an exclusive set of factors that would not protect the rights of children to physical and emotional safety and adequate nurture.

1. Washington Law Is Consistent With Numerous Decisions That Reject Vagueness Challenges To Parental Termination Laws

Washington's law is consistent with numerous decisions that reject vagueness challenges to parental termination provisions. Indeed, petitioners concede that "the majority of . . . case[s] have upheld necessarily general statutory provisions governing termination issues against [vagueness] challenges". Pet. at 26-27.

So long as the statutes provide guarantees against arbitrary results in terminating parental rights, an extremely wide variety of approaches have been upheld as satisfying due process. Wanda Ellen Wakefield, Annotation, *Validity of State Statute Providing for Termination of Parental Rights*, 22 A.L.R.4th 774 (1983 & Supp. Sept. 1999). Statutes using various terms to describe the elements of parental unfitness have been upheld in the context of individual states' statutory schemes. *E.g.*, *In re Cody W.*, 31 Cal. App. 4th 221, 36 Cal. Rptr. 2d 848 (1994), *cert. denied*, 516 U.S. 825 (1995) (failure to define physical or emotional "detriment" in the dependency statute did not make it unconstitutionally vague, and mother's argument that the termination court failed to find unfitness was unsupported in the record); *In re J.J.*, 366 Pa. Super. 94, 530 A.2d 908 (1987) (termination statute using the phrase "repeated and continued incapacity or neglect" was not unconstitutionally vague); *Matter of J.H.*, 468 N.E.2d 542 (Ind. App. 1984) (statute allowing termination was not unconstitutionally vague based on following elements: child in need of services had been removed from the home for at least six months under a disposition order and there was reasonable probability that conditions that resulted in the child's removal from the home would not be remedied; clarity and intent of statute were apparent when read in context of the statute defining a child in need of services); *In re M.B.C.*, 125 Ill. App. 3d 512, 466 N.E.2d 273 (1984), *appeal dismissed*, 471

U.S. 1062 (1985) (statute allowing deprivation based on "depravity" was not overly vague in that additional definition would limit the trial court's focus to the unique facts of each case before it); *accord, e.g., In re B.C.*, 356 N.W.2d 328 (Minn. App. 1984); *People v. D.A.K.*, 198 Colo. 11, 596 P.2d 747, *appeal dismissed*, 444 U.S. 987 (1979) (terms "abuse" or "mistreat" not unconstitutionally vague); *In re Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979) (inability to perform "parental responsibilities" and exercise "proper parental control" not unconstitutionally vague); *In re William L.*, 477 Pa. 322, 383 A.2d 1228, *cert. denied, Beatty v. Lycoming Cy. Children's Servs.*, 439 U.S. 880, *and cert. denied, Lehman v. Lycoming Cy. Children's Servs.*, 439 U.S. 880 (1978) (termination based on showing that conditions justifying removal could or would not be remedied was constitutional).

Of particular relevance to this case, many states hold that termination is constitutionally proper upon showing, pursuant to statute, that the parent will remain incapable of caring for the child due to manifestations of or conduct related to mental illness. *State v. Smith*, 785 S.W.2d 336 (Tenn. 1990) (due process satisfied upon clear and convincing evidence that mentally ill mother failed to remedy "conditions" that led to removal of the child after several months; court refused to add a judicial gloss of "willful" conduct to the statute); *Interest of L.G.*, 764 S.W.2d 89 (Mo.), *cert. denied*, 491 U.S. 909 (1989) (statute was not unconstitutionally vague in that it required consideration of four "conditions"; court rejected mentally ill parent's contention that statute violated due process in that it did not require proof of actual or likely harm beyond that shown in the dependency, although evidence did indicate nonetheless a showing of additional potential harm); *In re Christina A.*, 213 Cal. App. 3d 1073, 261 Cal. Rptr. 903 (1989) (statute not unconstitutionally vague in allowing termination of parental rights in that it defined mental disability as "any mental incapacity or disorder which renders parent . . . unable to adequately care for or control the child" and protected

against arbitrary enforcement); *Matter of Gentry*, 142 Mich. App. 701, 369 N.W.2d 889 (1985) (mother's mental illness supported termination of parental rights despite vagueness claim that the statutes did not permit a person of ordinary intelligence to discern prohibited behavior in that there was strong evidence of neglect by the mother at birth and the mother suffered from twenty years of mental problems; additionally, the following terms used in the statute had been sufficiently delineated by the courts to withstand the vagueness challenge: "proper", "unfit home", "fit home", "mental deficiency or mental illness", and "reasonable expectation"); *Matter of Joyce T.*, 65 N.Y.2d 39, 489 N.Y.S.2d 705, 478 N.E.2d 1306 (1985) (statute allowing termination based on current and likelihood of future manifestations of mental illness making parent unable to provide proper and adequate care did not violate due process or equal protection provisions in that the statute provided significant protections and did not authorize termination based on status as mentally ill but rather on conduct demonstrating inability to care for the child); *Thompson v. Arkansas Soc. Servs.*, 282 Ark. 369, 669 S.W.2d 878, *appeal dismissed*, 469 U.S. 926 (1984) (statute must be cast sufficiently broadly to encompass all proscribed behavior and was not unconstitutionally vague where court may consider long-standing mental illness); *In re Interest of Spradlin*, 214 Neb. 834, 336 N.W.2d 563, *cert. denied*, 464 U.S. 1011 (1983) (termination statute not unconstitutionally vague in allowing deprivation when parents were found unable to discharge their parental responsibilities due to prolonged mental illness since it provided adequate standards and decisive factor was effect of mental illness on the parents' ability to care for the child); *In re Sylvia M.*, 82 A.D.2d 217, 83 A.D.2d 925, 443 N.Y.S.2d 214 (1981), *aff'd, Matter of Guardianship & Custody of Nereida S.*, 57 N.Y.2d 636, 454 N.Y.S.2d 61, 439 N.E.2d 870, *reargument denied, Matter of Nereida S.*, 57 N.Y.2d 775, 454 N.Y.S.2d 1033, 440 N.E.2d 1343, *and reargument denied*, 57 N.Y.2d 775, 454 N.Y.S.2d

1033, 440 N.E.2d 1343 (1982) (termination statute was not unconstitutionally vague in providing for deprivation when parents were unable to care for their children for the "foreseeable future" due to "mental illness" placing the children in "danger of becoming neglected" and of not receiving "proper and adequate care"); *In re David B.*, 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (1979) (termination upheld even in absence of evidence that the mother had abused or neglected her child where evidence showed that the mental illness could be expected to continue regardless of medical treatment; deprivation was determined to be the least detrimental alternative for the child).

Washington law is consistent with these decisions. There are no due process questions that require resolution by this Court.

2. The Due Process Decisions Cited By Petitioners Were Decided Prior To *Santosky v. Kramer* And Are Unique To Their Context

Petitioners cite three decisions to support their claim that this case presents important unresolved due process issues related to vagueness in parental termination statutes. Pet. at 27-29. The cases cited by petitioners in support of their vagueness challenge are dated and unique to their contexts. The statutory schemes they concern bear little resemblance to Washington's provisions and the body of case law interpreting those provisions. Notably, each of the decisions cited by petitioners in support of their vagueness arguments was authored prior to *Santosky*, which provided a framework regarding parental unfitness under the "clear, cogent, and convincing standard". The three cases take basically the (subsequently disfavored) stance that, essentially, the Legislature must make a list of proscribed conduct.

Alsager v. District Court of Polk County, Iowa (Juvenile Division), 406 F. Supp. 10, 18 (S.D. Iowa 1975),

opinion adopted by Alsager v. District Court of Polk County, Iowa, 545 F.2d 1137 (8th Cir. 1976), cited by petitioners, has been substantially distinguished; furthermore, the case involved a statute without judicial gloss—a situation not comparable to Washington's well-establish statute and case law interpreting it.[11] Notably, "[t]his district court opinion was affirmed on other grounds, the [Eighth Circuit Court of Appeals] specifically noting that 'there is no collateral estoppel effect to be afforded the district court's resolution of [the vagueness] question.'" *Interest of Ponx*, 276 N.W.2d 425, 431 (Iowa 1979) (quoting *Alsager*, 545 F.2d at 1138).[12]

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[11] The practices at issue in *Alsager* bear little resemblance to Wash. Rev. Code 13.34 or to the circumstances of the Swenson case. In *Alsager*, the children were adjudicated "neglected" one week after their removal from their parents' home, and a termination petition was filed less than one month after the neglect determination. *Alsager*, 406 F. Supp. at 13-14. The parents had counsel only intermittently. *Id.* at 14. The parents challenged the clarity of the statutory determinations that they "refused to give the child necessary parental care and protection" and were "unfit . . . by reason of . . . conduct . . . detrimental to the physical health or morals of the child". *Id.* at 18. In addition, the parents challenged several other defects, alleging that: They were not provided adequate notice of the termination proceedings; the standard of proof applied to unfitness determinations was "preponderance of the evidence" only; evidentiary standards were ignored; and impermissible ex parte communications may have occurred. *Id.* at 15.

The federal district court ruled on these issues because the Iowa Supreme Court had failed to narrow the construction in its prior deprivation cases or in the earlier appeal of the Alsagers' own case. *Id.* at 21. In turn, the Eighth Circuit Court of Appeals ruled specifically that it did not need to reach and did not reach the vagueness and overbreadth attacks upon the facial validity of the termination statute or the appropriate standard of proof at termination proceedings. *Alsager*, 545 F.2d 1137.

[12] The Eighth Circuit Court of Appeals invited Iowa courts to place a limiting interpretation on the statutory provisions at issue. *Alsager*, 545 F.2d at 1137-38. Thereafter, in *Interest of Ponx*, 276 N.W.2d at 429-32, the court held that "necessary parental care and protection" were not vague when, as in most cases, the parents were well-informed of the issues prior to the termination proceedings through social

Roe v. Conn, 417 F. Supp. 769, 780 (M.D. Ala. 1976), adopted the reasoning of the district court in *Alsager*. Alabama allowed deprivation of parental rights based on a showing of neglect alone. It did not provide an immediate hearing following seizure of a child, even in nonemergency situations. Further, the state failed to provide representation for the child at any proceeding under its child welfare

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worker visits, mental health visits, and establishment of goals. In *Interest of Hochmuth*, 251 N.W.2d 484, 488 (Iowa 1977), the court noted that the Circuit Court of Appeals declined to reach the vagueness issue, and the Iowa court chose to review it itself. The *In re Hochmuth* court determined that the statute's language was adequately certain in that the parent had been provided notice of proscribed conduct nine months prior to the termination proceedings; as applied to the parent before the court, the language "was both specific and precise". *Id.* at 488. In *Long v. Long*, 255 N.W.2d 140 (Iowa 1977), where the parents had two years to correct conditions justifying termination of parental rights, the court determined that the statute in question had been fully elucidated and was constitutional as applied. Therefore, the parents' Fourteenth Amendment rights were protected under it. The court abandoned also the *Alsager* reasoning that the state had a more compelling interest in rescuing children from past mistreatment than in protecting them from future abuse or neglect, stating "we are required to determine the long-range as well as immediate interests of the child. In the same vein, this court has observed that parent-child termination proceedings are not like a tort action where injury must be proved before damages recovered. Our termination statute is preventative as well as remedial. It mandates action to prevent probable harm to children and does not require delay until after harm is done." *Long*, 255 N.W.2d at 143 (citations omitted). In *Interest of Lewis*, 257 N.W.2d 505, 510-11 (Iowa 1977), the court decided that the phrase at issue ("reasonable efforts under the direction of the court had failed to correct the conditions leading to the termination") was not unconstitutionally vague. The court decided in *Interest of Crooks*, 262 N.W.2d 786, 788 (Iowa 1978), that the statute was unconstitutionally vague as applied when the mother's parental rights were terminated in large part because she failed to attend counseling. Nowhere could the court find a direction of the juvenile court that the mother attend this service. Conversely, in *Interest of Kelley*, 262 N.W.2d 781 (Iowa 1978), filed separately on the same date by the same court as *Crooks*, the juvenile court had enunciated a program for remedying the conditions which led to the initial adjudication of neglect, and the termination of the father's parental rights was affirmed.

provisions. Additionally, the statutory scheme failed to recognize the rights of parents to be heard and contest termination proceedings. In each of these particulars, the Alabama statute was distinct from Washington's provisions.

In *Davis v. Smith*, 266 Ark. 112, 583 S.W.2d 37 (1979), the court followed *Alsager* and cited *Roe*. The court declined to define "improper home" in the context, of a statute that allowed the appointment of a guardian with authority to consent to adoption. Again, Washington provides not only clarity in the statute but extensive case law interpreting the terms at issue in Wash. Rev. Code § 13.34.180(5).

In Washington, "conditions" to which the Wash. Rev. Code § 13.34.180(5) refers are the deficiencies of the parents and their unfitness to provide necessary care to the child.[13] Further, although the terms of Wash. Rev. Code § 13.34.180(5) are clear on the statute's face, case law in Washington has long recognized that language must not be viewed in a vacuum:

> "While it is true that what is 'proper parental care' or 'proper maintenance' is subject to value judgments, which may vary from person to person or from judge to judge, these expressions do not stand in isolation. If the statute is viewed as a whole,

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[13] The child is the individual child at issue in the case. Appellate courts have long held that each child welfare case must be decided on its own merits. *In re Aschauer*, 93 Wash. 2d at 695; *In re Ward*, 39 Wash. 2d 894, 895, 239 P.2d 560 (1952). "It is with the welfare of the children in mind that parental rights are examined." *In re Sego*, 82 Wash. 2d 736, 738, 513 P.2d 831 (1973). Washington has long recognized that children are not chattel; their rights must be protected as well as those of their parents. *E.g.*, *In re Harney*, 19 Wash. App. 85, 574 P.2d 395, *review denied*, 90 Wash. 2d 1015 (1978).

the language takes on substantial objectivity." *In re Aschauer*, 93 Wash. 2d at 697 (interpreting former Wash. Rev. Code §§ 13.04.010 and .140).

3. Wash. Rev. Code § 13.34.180(5) Is Not Unconstitutionally Vague

Wash. Rev. Code § 13.34.180(5) is not unconstitutionally vague when read in the context of its chapter and case law interpreting it. "Proof of statutory factor (5) requires a showing that, at the time of the termination hearing, there were parental deficiencies that [the parent] was unlikely to cure in the near future; that is, proof of then present parental unfitness." *In re S.V.B.*, 75 Wash. App. 762, 773-74, 880 P.2d 80 (1994). "Conditions" also include the ability of the child to be integrated into the family home. *In re K.R.*, 128 Wash. 2d at 145. They include the biological parents' "ability to shoulder parental responsibility and follow legal orders of the court". *Id.* at 146. In making the determination of ultimate fact under Wash. Rev. Code § 13.34.180(5), the trial court considers properly the child's attachments and bonds. *Id.* at 147.

"Proper care" has been defined in Washington by extensive case law setting forth parents' obligations to provide adequate care. Minimum obligations of parenthood include the expression of personal concern over the health and general well-being of the child, the duty to provide necessities (such as food, clothing, and medical care), and the duty to furnish appropriate guidance. *In re Adoption of Lybbert*, 75 Wash. 2d 671, 674, 453 P.2d 650 (1969).

In addition, parents have obligations to meet their child's emotional, physical, and developmental needs. *In re H.J.P.*, 114 Wash. 2d 522, 532, 789 P.2d 96 (1990); *In re Young*, 24 Wash. App. 392, 397, 600 P.2d 1312 (1979), *review denied*, 93 Wash. 2d 1005 (1980); *In re Schultz*, 17 Wash. App. 134, 141-42, 561 P.2d 1122 (1977) (parents were willing to let their child be raised in foster care, with no

foreseeable end in sight; the child was entitled to more than this). Expression and feeling of love toward the child, while significant, are not enough to satisfy the obligation to properly care for the child. *E.g.*, *In re Aschauer*, 93 Wash. 2d at 694; *In re Moseley*, 34 Wash. App. 179, 181, 660 P.2d 315, *review denied*, 93 Wash. 2d 1018 (1983). "When parental actions seriously conflict with the *mental or physical health* of their child . . . the State has the right and responsibility to intervene to protect the child." *In re Sumey*, 94 Wash. 2d 757, 762, 621 P.2d 108 (1980) (emphasis added); *accord* Wash. Rev. Code § 13.34.020.

The court may consider behavior and symptoms of a parent's mental illness that interfere with caring for the child. *E.g.*, *In re Chubb*, 112 Wash. 2d 719, 773 P.2d 851 (1989); *In re Ramquist*, 52 Wash. App. 854. The court considers evidence of mental disorder as a circumstance within the totality of circumstances. *In re Mauser*, 15 Wash. App. 231, 235, 548 P.2d 333 (1976). It may consider the parent's function after the parent is stabilized on medication, yet there is no indication of further improvement. *In re Moseley*, 34 Wash. App. at 186. The court may consider also relative stability at the time of the termination proceedings of parents who have periods of problems in functioning based on underlying mental illnesses or disorders. *Krause*, 47 Wash. App. at 736, 746-47. The parent's lack of insight into the condition may be considered. *Id.* at 747.

"While the State is barred from arbitrarily removing children merely because the parents are mentally ill, the mentally ill are not immune from having children removed if they are unfit." Pet. App. at A-15. A child should not be in the custody of parents whose mental illness renders them unable to understand or meet the child's needs. *In re Frederiksen*, 25 Wash. App. 726, 733, 610 P.2d 371 (1979), *review denied*, 94 Wash. 2d 1002 (1980); *In re Aschauer*, 93 Wash. 2d 689.

The circumstances at the termination proceedings cannot mirror those at the dependency proceedings in any exact manner, if only due to the passage of time.[14] Indeed, because termination decisions are predicated on current parental deficiencies (i.e., those at the time of the termination proceedings), the findings in the dependency are not of central importance; notably, under Washington's statutory proceedings, parental unfitness is re-established at the termination proceedings by proving all elements of Wash. Rev. Code § 13.34.180. *In re A.W.*, 53 Wash. App. at 29; *Krause*, 47 Wash. App. at 743; *In re Chubb*, 46 Wash. App. 530, 536-37, 731 P.2d 537 (1987); *see* Pet. App. at A-9, 10 (Court of Appeals discussion of this issue).

4. Wash. Rev. Code § 13.34.180(5) Was Applied Constitutionally In This Case

The trial court interpreted Wash. Rev. Code § 13.34.180(5) in a constitutional manner and relied on substantial evidence of a clear, cogent, and convincing nature

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[14] For example, the review process itself contemplates court oversight of evolving circumstances by mandating review hearings on a regular basis resulting in updated findings of dependency. Former Wash. Rev. Code § 13.34.130(5); *In re A.W.*, 53 Wash. App. at 28. Further, as in effect at the time of the proceedings below, Wash. Rev. Code § 13.34.145(1)(b) provided that "identified outcomes and goals of the permanency plan may change over time based upon the circumstances of the particular case". The permanent plan may identify alternative goals so as to maintain flexibility in meeting the ultimate goal of "securing a safe, stable, and permanent home for the child as soon as possible". Wash. Rev. Code § 13.34.145(1)(a). Additionally, Wash. Rev. Code § 13.34.120 assumes a fluid process in which the parties (including the parents) participate in planning over time. Wash. Rev. Code § 13.34.150 provides for changes to orders of the court "upon changes in circumstances". The working of these statutes was reflected in this case as permanency planning goals changed in response to the reality of the parents' progress and the child's development, review orders reflected progress or lack thereof, and orders were entered upon motions made by one party or another believing that changed circumstances required alteration of the status quo.

to make its ultimate findings regarding Wash. Rev. Code § 13.34.180(5). Indeed, while the petitioners attempt to construct a constitutional challenge, their basic complaint remains that they dispute the factual determinations and application of the law below.

The trial court recognized that the behaviors illustrating conditions of parental unfitness at the time of termination proceedings cannot be an exact reflection of those demonstrated years before at the initial dependency determination. Pet. App. at C-11, 12. Nonetheless, "[t]he termination was based on present inability to correct the parenting problems that were litigated throughout the dependency." Pet. App. at A-12 (citing *In re A.W.*, 53 Wash. App. at 29); *see also* Pet. App. at A-13 (additional explanation regarding notice and opportunity to be heard); Br. Opp'n App. A (sample review findings, conclusions, and order, in this case setting forth the dependency court's ruling regarding the issue of changed or evolving circumstances).

The trial court made explicit findings of current unfitness which were manifestations of the same basic deficiencies that supported removal of Hannah from her parents' home when she was an infant; these problems were litigated throughout the dependency. Pet. App. at A-12, 13. As found by the trial court, the parents continued to demonstrate significant deficiencies, despite ongoing availability of extensive services.[15] Pet. App. at C-2 to C-12. They were "unable to parent [Hannah] with little or no likelihood of change in the near and foreseeable future". Pet.

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[15] The parents contend they were limited to "State selected" services. Pet. at 8. While this may be the case in some dependencies throughout the United States, it was not the case here. Rather, "the Department in this case was willing to accept providers proposed by the parents in many instances". Pet. App. at C-2, 3. DSHS/DCFS followed recommendations of one of them to expand visits, but neither the parents nor the child could maintain the expansion. Pet. App. at C-13. The parents rejected the opportunity for an updated psychiatric evaluation by a provider acceptable to all parties. Pet. App. at C-6.

App. at A-7. The trial court found that "[t]here is little likelihood that conditions will be remedied so that the child could be returned to the parents in the near future." Pet. App. at A-5. It determined that this finding was based on clear, cogent, and convincing evidence. Pet. App. at A-4.

As when the dependency began, the parents were incapable at the time of the termination proceedings of meeting Hannah's basic needs for physical and emotional nurture (their deficits in the latter regard being more profound). As found by the trial court, "[c]hronic mental health issues interfere with the parents' abilities to meet the child's physical, emotional and developmental needs." Pet. App. at C-7. The court addressed as well the inability to cope (even with Hannah out of the home) that was an ongoing issue during the dependency: "Stress is a significant problem for both parents, and it becomes overwhelming at times for Mr. Swenson." Pet. App. at C-7. The parents' mental health problems were chronic (dating from well before Hannah was born) and included psychiatric hospitalizations. Pet. App. at C-7, 8. The court found further: "The parents['] own limitations will hinder them in addressing Hannah's developmental needs as she matures . . . and their limitations will make recognition of and response to Hannah's emotional needs particularly difficult." Pet. App. at C-8.

The trial court addressed directly the issues of current unfitness as they related to the problems identified in the dependency:

> "The pragmatic implications of the parents' mental illnesses rather than the precise label applied to them are of concern here. Here, the parents' impairments preclude them from meeting the child's emotional and developmental needs to such an extent that no court would return the child to her parents' home throughout the course of the dependency.

> *These inabilities continue to exist.* Although the parents try to follow the scripts they learn via parenting instruction, their mental illnesses manifest in a concrete, inflexible approach to dealing with new scenarios. The parents lack problem-solving abilities and abilities to respond to new, unforeseen and unscripted problems. These are the daily course of parenthood, as scripts for each situation that will confront the parents do not exist." Pet. App. at C-9 (emphasis added).

See also Pet. App. at C-8 (parents did not progress sufficiently during the dependency to meet the child's developmental and emotional needs over time); Pet. App at C-10, 11 (rigidity on the mother's part and passivity on the father's part). As was the case at the commencement of the dependency, the parents had not developed a bond with the child despite extensive visitation opportunities. Pet. App. at C-9, 10, 12-13.

In summary, as the Court of Appeals reiterated: "The issues underlying the termination are the same issues that were repeatedly litigated throughout: inability to meet the child's emotional and developmental needs, inability to respond outside the concrete, lack of flexibility and inability to react to new scenarios, and poor judgment." Pet. App. at A-13.

In the course of three and one-half years, the parents were unable to remedy the conditions of parental deficiency that made them incapable of providing adequate care for Hannah, despite infusion of multiple, appropriate services. The litigation herein evidences the full panoply of constitutional protections applied to the parents. There was no constitutional problem in the process justifying review by

this Court. Rather, the parents seek another opportunity to have the facts determined. That is not this Court's role.

CONCLUSION

The Petition For A Writ Of Certiorari should be denied.

RESPECTFULLY SUBMITTED.

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APRIL 3, 2000

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

JUVENILE DIVISION

IN RE DEPENDENCY OF: HANNAH SWENSON (DOB 11/25/92)	NO. 93-7-00117-0 DEPENDENCY REVIEW HEARING ORDER [X] PERMANENCY PLANNING REVIEW [X] CONTESTED

THIS MATTER came on for a contested review hearing April 16-17, 1996 before the undersigned court commissioner. The following were present for the hearing: Lorilei Swenson, the child's mother; Brent Swenson, the child's father; Tom May, the parents' attorney; Allen Gauper, attorney for intervenors (relatives with whom the child is placed); Mildred Staley, the child's court-appointed guardian ad litem; Mark Kamitomo, attorney for the child's GAL; Joe Reeves, Social Worker for the Department of Social and Health Services (DSHS), Division of Children and Family Services (DCFS); and Sylvia Glover, AAG, the agency's attorney.

Witnesses called by the parties and exhibits admitted by the court are as set forth in the clerk's minutes. The court having reviewed the files and records herein, and being fully advised in the premises, now makes the following:

I. FINDINGS

1.1 The child was found to be a dependent child pursuant to RCW 13.34.030[4] on June 16, 1993 as to the mother and on May 2, 1993 as to the father.

1.2 The child is currently placed in out of home care under the custody and supervision of DSHS/DCFS agency.

1.3 The agency plan is contested.

1.4 (a) The mother: has substantially complied with the court ordered services and responsibilities during the review period;

(b) The father: has substantially complied with the court ordered services and responsibilities during the review period;

(c) The child: has complied with the court ordered services: Assessment and counseling.

(d) The agency has complied with the court ordered services and all responsibilities: Provided case management, supportive casework services including in-home services and services for the child, referral to appropriate services, monitoring of child's placement and services.

1.5 Court supervision should continue.

1.6 A reason for removal of the child from his/her home as set forth in RCW 13.34.130(1) (b) continues to exist; and

Reasonable services have been provided or offered to the parties to facilitate reunion;

The child has been placed in the least restrictive setting appropriate to the child's needs and consideration has been given to placement with relatives. The child is placed with relatives, her paternal uncle and aunt (his wife). DSHS/DCFS acted correctly to place the child with relatives who have a history with the child and are available for her if permanent placement is required. The uncle and aunt were known to the child at the time of

placement, and she was comfortable with them then and remains so.

There is a continuing need for out of home placement and the placement recommended by the supervising agency is appropriate.

1.7 Looking to the dependency as a whole, progress has been made toward correcting the acute problems that necessitated the child's placement in out of home care. The issues are not currently those at issue when the child was removed from her parents' home, at which time the parents were as a result of their mental illnesses in great distress and seriously impaired in their ability to engage in activities of daily living. Although the parents have progressed in comparison to their issues at the time the dependency was established, they have reached a plateau and the court does not find continued progress.

1.8 Experts testifying herein are in conflict regarding the parents' diagnoses and prognoses. All agree the parents suffer from mental illness affecting their life functions seriously in the past and potentially in the future. The parents are currently on psychotropic medications, as they have been for the last several years; Both Dr. Manz and Dr. Clark testified that the medications are working well for Lorilie Swenson and Brent Swenson.

Dr. Manz (court ordered psychiatrist who examined the parents and child) and Dr. Clark (psychiatrist hired by the defense) disagreed about the parents' diagnoses. Concerning the issue of diagnoses or labeling of the parents' mental illnesses, psychiatry and diagnosis are not exact sciences and there is room for reasonable professionals to disagree. Neither Dr. Manz (diagnosing the parents as paranoid schizophrenic [with intermittent depression on Brent Swenson's part]) nor Dr. Clark (providing several differential diagnoses) have seen the parents in acute exacerbations of their illnesses, relying instead upon history and report. The court's concern about the accuracy of the historical diagnoses

of these parents does not negate Dr. Manz's analysis in any significant respect.

1.9 The real issue is not the label(s) of the parents' mental illness(es). Pragmatically, the finder of fact must look to how the mental illnesses of the parents manifest themselves and impact the child.

The court finds: The parents' skills and parenting practices were impaired at the time of removal and there is no question that removal was necessary; there is no claim herein of intentional abuse; the parents' have progressesd in basic functions.

The court finds further, however, that the parents' inability to meet the child's emotional and developmental needs required that the child remain out of the home. Although the parents follow the scripts they learn via parenting instruction, their mental illnesses manifest in a concrete, inflexible approach to dealing with new scenarios. The parents lack problem-solving abilities and abilities to respond new, unforeseen, unscripted problems. Such deficiencies are significant because new, unforeseen developments are the daily course of parenting. The problems of life are complex and sophisticated, and scripts for each situation that confronts the parents do not exist.

The court finds further that the parents exhibit lack of judgment as a manifestation of their mental illnesses. The mother in particular blurs boundaries between her role as parent and the role of playmate. Inadvertently, she either monopolizes activities, intrudes or makes herself a playmate. The mother's over-control of the child irritates and frustrates the child's development.

The court finds that the parents exhibit the inability to empathize and the inability adequately perceive cues as manifestations of their mental illnesses. They tend to oversimplify in their perception of parenting and the child's needs, and they are somewhat naïve. The parents' suggestion

that they should leave Spokane for Ellensburg or Wenatchee shows dramatic disregard for the needs of the child by failure to recognize her attachment to other family members who have been her caretakers. The parents do not recognize that the relative caretakers are the psychological parents to the child. The parents' failure to recognize the child's emotional needs places her at risk.

The court finds that Hannah's emotional needs and developmental needs would be unmet if she were returned to her parents' home. They cannot by force of educational or parenting programs develop the ability to engage in abstract or complex thought so as to engage their child. The parents cannot meet Hannah's needs for stimulation and emotional care. [*The parents cannot educate the child by modeling problem solving for problems.]

The child suffers confusion in having parents who cannot meet her emotional requirements or establish clear boundaries. The risks inherent in unclear boundaries include parent-child role confusion and parentification of the child. Confusion and role reversal are already apparent in the visitation schedule which (as the child's psychiatrist testified, among others) results in confusion about where she belongs and the roles of the adults in her life. Further, already, the child reverses roles during visits and improperly dictates outcomes.

The court finds that the paramount issue herein is potential trauma to the child if she is returned home. She is bonded to the relative caretakers who of necessity have provided care to her for most of her life. Uprooting Hannah would create high risk to her emotionally and developmentally, and it would turn her into a special needs child. The primary task of the dependency process is to serve the child's best interests. The Parents do not show the sensitivity to Hannah's needs or cues necessary to negate the trauma uprooting her would cause. These inabilities would cause her development to be derailed if she were returned home.

1.10 Visitation has occurred as follows during the review period: 5 days per week between July and the December 1995 order modifying visits; 3 half-days per week since December 1995—two visits at the Visitation Center, one at the parents' home. Some visits have been cancelled due to the child's illnesses. Visits since December have been supervised. James Mahoney, MSW, performed the court-ordered assessment of the visits and parent-child interaction.

Based on the testimony of the experts who work with the child, the child's guardian ad litem and social worker herein, the court finds concerning visits since the modification hearing in December 1995: Visits continue to stress the child, and this stress is expressed through behavior, petulance and weight loss. The present visitation schedule is harmful to the child and not in her best interests. Visits should be reduced and should take place in an environment providing the maximum sense of security for the child (such as the Visitation Center).

1.11 Additional services not previously ordered are not needed to facilitate return of the child to the parents. This case has been saturated with services since its beginning.

1.12 Permanency Plan

The permanency plan prepared by DSHS/DCFS is for: Stable and permanent home, now to be pursued via adoption by the uncle and aunt with whom the child is placed.

The permanency planning goal has not been achieved because reunification efforts were ongoing with concurrent planning.

The following need to be done to make it possible to achieve the primary goal: Resolve issues via termination of parental rights proceeding set for April 29, 1996.

[To the extent not inconsistent with the findings herein, the court incorporates its oral opinion by way of explanation of the findings.]

II. ORDER

21. The child remains a dependent child pursuant to RCW 13.34.030 (2) and DSHS/DCFS is the supervising agency.

2.2 The child shall not be returned home and shall remain in the care, custody and control of DSHS for placement.

Visitation shall occur between the parents and child as follows: One short visit per week (up to one hour); one longer visit per week (a minimum of two hours). Visits shall be supervised and at a location providing the maximum sense of security for the child, such as the Visitation Center.

2.3 Additional services shall occur between the parents and child as follows: No additional remedial services shall be offered. The parents shall engage in a psychiatric assessment with a provider acceptable to all parties, attention of the doctor to be directed to the parents' diagnoses and treatment regimens with mindfulness toward the effect change of regimen may have on the parents' stability (and, therefore, potential availability to Hannah). This service shall not be deemed a precondition to termination of parental rights nor shall engagement or failure to engage in it be used to postpone that proceeding.

2.4 PERMANENCY PLANNING REVIEW ORDER

The permanency plan prepared by DSHS/DCFS shall be implemented.

2.5 IT IS FURTHER ORDERED: The parents shall continue in their individual treatment for mental illness at Community Mental Health Center, Adult Services, and shall maintain use of their mediation as directed by their psychiatrist there. The parents shall return to the Child Abuse Project when they are deemed eligible for that program by its intake personnel; parents may re-engage in intake upon request to DSHS and CAP.

All services previously ordered which have not yet been successfully completed need to be completed by the appropriate parties. Periodic progress reports from the service providers shall be made available to the social worker, guardian ad litem and attorneys. The foster parents are allowed to travel up to two weeks out of state with this child, with prior notice to all parties. The foster parents may consent to any necessary medical or dental treatment during such trips.

The person or agency having custody of the child shall have full power to authorize and provide all necessary medical, dental or psychological care as recommended by the child's treating doctor or psychologist.

A non-contested review hearing shall be held on September 19, 1996 at 1:00 p.m. The parents shall appear for the hearing.

DATED this 26th day of April, 1996.

/s/J. Valente
COURT COMMISSIONER

Presented by:

/s/
SYLVIA GLOVER
Assistant Attorney General
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Notice: A petition for termination of the parent-child relationship pursuant to RCW 13.34.180 may be filed after six months of out of home placement pursuant to an order of dependency.

Notice: The violation of any restraining order or no-contact order set forth herein may constitute a criminal offense and a contempt of court.

Supreme Court, U.S.
FILED
APR 3
CLERK

(3)

No. 99-1279

IN THE

Supreme Court of the United States

B.S. and L.S.,

Petitioners,

v.

THE WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION THREE

BRIEF IN OPPOSITION FOR RESPONDENT MILDRED STALEY, GUARDIAN AD LITEM FOR HANNAH SWENSON

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This brief in opposition to the Petition for a Writ of Certiorari is filed on behalf of Mildred Staley, Guardian ad Litem for Hannah Swenson.

RESTATEMENT OF THE CASE

Brent and Lorilei Swenson were not able to take care of their daughter when she was born, by their own admissions, and they remained unable to care for her four years later when parental termination proceedings were held. Nonetheless, they sought to prolong their daughter's sojourn in foster care indefinitely and preserve their parental rights, presumably in the hope that they could somehow develop parenting skills necessary for their daughter's physical and mental health and well being, and despite the fact that they had been unable to develop those basic parenting skills in the previous four years. The trial court properly terminated the Swensons' parental rights under these circumstances, and the Washington Court of Appeals properly affirmed that decision. Having exhausted their state court appeals, Brent and Lorilei Swenson now attempt to characterize Washington's parental termination law as unconstitutional.

A. Washington's parental termination law.

Termination of parental rights cannot occur in Washington until a child is first found to be "dependent." Wash. Rev. Code § 13.34.180(1); Wash. Rev. Code § 13.34.030(2). The grounds for dependency include abandonment, or parental abuse or neglect. Wash. Rev. Code § 13.34.030(2). Following a determination of dependency, the child may be placed in foster care or with a relative, while the parents are given an opportunity to correct the grounds for dependency with the support of social service

agencies and health care providers. Wash. Rev. Code § 13.34.130. The dependency is reviewed periodically to determine whether grounds for dependency persist. Wash. Rev. Code § 13.34.130(5). Because the dependency does not entail a termination of parental rights, the grounds for dependency must be proved only by a preponderance of the evidence. Wash. Rev. Code § 13.34.130.

If the dependency persists more than six months after the child is placed in foster care or with a relative, the State may initiate termination proceedings. Wash. Rev. Code § 13.34.180(1-3). Termination of parental rights may be ordered upon proof that: "all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided[,]" Wash. Rev. Code § 13.34.180(4); "there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future[,]" Wash. Rev. Code § 13.34.180(5); and "continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home[,]" Wash. Rev. Code § 13.34.180(6). Each of these requirements must be proved by "clear, cogent, and convincing evidence." Wash. Rev. Code § 13.34.190(1). "Clear, cogent, and convincing evidence" exists when the ultimate fact in issue is shown by the evidence to be "highly probable." *In re Sego*, 82 Wash. 2d 736, 739, 513 P.2d 831 (1973) (quotation omitted).

Although dependency is a prerequisite to termination, the termination does not rest on the original grounds supporting the dependency. The parental termination statute does not require relitigation of the original grounds for

dependency, *In re JC*, 130 Wash. 2d 418, 428, 924 P.2d 21, 26 (1996), and the determination of dependency does not have res judicata effect in termination proceedings, *In re KR*, 128 Wash. 2d 129, 144-145, 904 P.2d 1132 (1995).

Termination "necessarily" requires clear, cogent and convincing evidence of "current parental unfitness." *In re KR*, 128 Wash. 2d 129, 142, 904 P.2d 1132 (1995); *accord Krause v. Catholic Community Servs.*, 47 Wash. App. 734, 742, 737 P.2d 280, *rev. denied*, 108 Wash. 2d 1035 (1987) (stating "[t]he termination decision must be predicated upon present parental unfitness."). This follows from the statutory requirement of proof by clear, cogent, and convincing evidence that "there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future[,]" Wash. Rev. Code § 13.34.180(5). *Krause*, 47 Wash. App. at 742, 737 P.2d 280; *In re AW*, 53 Wash. App. 22, 28-29, 765 P.2d 307 (1988).

The "conditions" establishing current parental unfitness are expressly defined to include:

> Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future[.]

Wash. Rev. Code § 13.34.180(5)(b). Conditions establishing parental unfitness are not limited to the statutorily defined

circumstances, Wash. Rev. Code § 13.34.180(5), in order to reflect the broad array of circumstances giving rise to parental termination proceedings, *In re Aschauer*, 93 Wash. 2d 689, 695, 611 P.2d 1245 (1980).

If termination is otherwise appropriate, and the requisite degree of proof is before the court, the court may nonetheless deny the termination of parental rights if not in the best interests of the child. Wash. Rev. Code § 130.34.190(4). The best interests of the child cannot serve as a basis to terminate parental rights, only as a basis to deny termination. *In re Ramquist*, 52 Wash. App. 854, 860, 765 P.2d 30 (1988), *rev. denied*, 112 Wash. 2d 1006 (1989); *In re AVD*, 62 Wash. App. 562, 571, 815 P.2d 277 (1991). Because it cannot serve as a basis for termination, the best interests of the child may be proved by a preponderance of the evidence. *Ramquist*, 52 Wash. App. at 860, 765 P.2d 30; *AVD*, 62 Wash. App. at 571, 815 P.2d 277; *In re SVB*, 75 Wash. App. 762, 775-776, 880 P.2d 80 (1994); *In re AJR*, 78 Wash. App. 222, 228, 896 P.2d 1298, *rev. denied*, 127 Wash. 2d 1025, 904 P.2d 1157 (1995).

B. The termination of Brent and Lorilei Swenson's parental rights.

Hannah Swenson was born on November 25, 1992. Within three weeks after her birth, she was placed into foster care at the request of her parents. She was subsequently found dependent, with the agreement of her parents, based on her mother's expression of improper sexual urges toward her, serious malnourishment and weight loss leading to a clinical diagnosis of "failure to thrive," and emotional instability precipitated by both parents' psychiatric disabilities, among other things.

During the dependency, serious parental deficiencies persisted. Periodic court review established that the dependency should continue, a conclusion with which Brent and Lorilei Swenson agreed at various times. (Pet. for Cert., App. C-11 to C-12.) As noted by the Washington Court of Appeals, "[t]he records of the final dependency review and termination hearings contain exhaustive expert testimony that the problems giving rise to the dependency remain unresolved." *Termination of Swenson*, No. 17264-3-III, slip op., at pp. 3-4 (Wash. App., Div. III, Mar. 9, 1999).

The trial court specifically found, by clear, cogent and convincing evidence, that Brent and Lorilei Swenson were unfit parents at the time of the termination hearing:

> The parents are unable to parent this child with little or no likelihood of change in the near and foreseeable future. There is little likelihood that conditions will be remedied so that the child could be returned to the parents in the near future.

(Pet. for Cert., app. C-7.) The trial court based its finding on the fact that Brent and Lorilei Swenson's "chronic mental health issues interfere with [their] ability to meet the child's physical, emotional and developmental needs." Brent Swenson suffers from severe schizophrenia and depression requiring electro-shock therapy and quantities of antipsychotic medication sufficient to incapacitate a healthy person. (Pet. for Cert., App. C-7 to C-8.) Lorilei Swenson suffers from schizophrenia and consumes a similar amount of antipsychotic medication, although she refuses to believe that she suffers from the illness. (Pet. for Cert., App. C-7 to C-8.) Their illness renders both parents unable to cope with the stress of raising a child. (Pet. for Cert., App. C-7.)

They cannot properly respond to problems or challenges confronted in "the daily course of parenthood." (Pet. for Cert., App. C-9.)

The trial court's findings were born out during the dependency and termination proceedings. "Extensive visitation opportunities" were provided during the dependency and, without fail, visitation had to be reduced by court order based on the Swensons' stress and the harm they caused to their daughter's "health, safety and welfare." (Pet. for Cert., App. C-9 to C-10.)

Even the expert witness originally retained by the Swensons opined that termination was warranted in this case. The trial court noted:

> The parents proposed Pam Aden, MS, as a provider. She has extensive experience working with parents and children; her goal was to facilitate reunification. Although Ms. Aden was intent on facilitating reunification, she concluded after ten to twelve sessions that the parents could not fulfill Hannah's needs then or in the future. The parents terminated her involvement.

(Pet. for Cert., App. C-5.)

The Swensons' received every opportunity to remedy their parental deficiencies without significant result. As noted by the Washington Court of Appeals after reviewing the record, "this case has been saturated with services from the beginning." *Swenson*, slip op., at p. 9. The trial court found that the Swensons "were only marginally amenable" to social services and cooperated with social service providers only

"intermittently." (Pet. for Cert., App. C-4.) "The record is replete with testimony that [Brent and Lorilei Swenson] have not benefited from the available parenting services and are unlikely to improve in the foreseeable future." *Swenson*, slip op., at p. 18 (brackets added.)

Up to the present time, more than six years after the Swensons gave up their daughter, this case has involved the efforts of four Department of Child and Family Services caseworkers and three guardians ad litem. It has involved evaluation and treatment by more than 20 service providers. It has been reviewed by eight judicial officers in the trial court and a panel of the Washington Court of Appeals. There is no need for additional review by this Court which would only serve to further postpone the development of a stable and permanent home for Hannah Swenson because this case involves nothing more than factual disputes among the litigants.

REASONS FOR DENYING THE WRIT

Brent and Lorilei Swenson argue that the trial court failed to apply the correct standard of proof in terminating their parental rights. There is no dispute that the due process of clause of the Fourteenth Amendment to the U.S. Constitution requires proof of the grounds for termination of parental rights by "clear and convincing evidence," or an equal or greater standard of proof as adopted by the state. *Santosky v. Kramer*, 455 U.S. 745, 769-770, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). There is no dispute that, in accordance with the constitutional imperative, Washington's parental termination statute, Wash. Rev. Code § 13.34.180, requires proof of each element by an equivalent standard of "clear, cogent and convincing evidence," Wash. Rev. Code § 13.34.190. In addition, there is no dispute that the trial court in this case applied the proper burden of proof. In its

written opinion, the court stated that "[t]he elements of [the parental termination statute] have been met and proven by clear, cogent and convincing evidence." (Pet. for Cert., App. C-15.) The court further stated that it had "taken into consideration the applicable burdens of proof in making its determinations." (Pet. for Cert., App. C-15.)

The Swensons complain, however, that the trial court did not base its determination of the best interests of their child according to the clear and convincing standard of proof. The Swensons also complain that the original determination of dependency, which is a prerequisite to parental termination proceedings under Washington law, was not based on a clear and convincing standard of proof. Neither of these complaints is well founded because the U.S. Constitution and Washington law do not require the best interests of the child or the grounds for pre-termination dependency to be proved by anything other than a preponderance of the evidence.

A. Because the best interests of the child cannot serve as the basis for termination of parental rights in Washington, a lower standard of proof than that required for termination conforms to the principles delineated in *Santosky v. Kramer*.

The Swensons attempt to create a conflict between Washington law and this Court's decision in *Santosky* by wrongly implying that a trial court can terminate parental rights under Washington law based on the best interests of the child. (Pet. for Cert., at 22-24.) The implication is entirely wrong. Parental rights in Washington cannot be terminated based on the best interests of the child. *In re Ramquist*, 52 Wash. App. 854, 860, 765 P.2d 30 (1988), *rev. denied*, 112 Wash. 2d 1006 (1989); *In re AVD*, 62 Wash. App. 562, 571,

815 P.2d 277 (1991). The best interests of the child determination simply gives the court "discretion not to grant termination" even when the grounds for terminating parental rights have been proven by clear, cogent and convincing evidence. *Ramquist*, 52 Wash. App. at 860, 765 P.2d 30; *AVD*, 62 Wash. App. at 571, 815 P.2d 277.

Initially, under Washington's parental termination law, the court determines whether the grounds for termination of parental rights exist by clear, cogent and convincing evidence. Wash. Rev. Code § 13.34.190(1)(a). The court then determines whether termination is in the best interests of the child. Wash. Rev. Code § 13.34.190(2). "The six termination factors must be established to the requisite degree of certainty before the court may focus on the best interests of the child." *In re HW*, 92 Wash. App. 420, 425, 961 P.2d 963 (1998).

The relevant statutory language joins the grounds for termination of parental rights and the best interests of the child with the conjunction "and," Wash. Rev. Code § 13.34.190, indicating that both must be proven before the court may order termination, *see King County Council v. Public Disclosure Comm'n*, 93 Wash. 2d 559, 562, 611 P.2d 1227 (1980) (stating statutory requirements conjoined with "and" must all be satisfied). If the court could order termination based solely on the best interests of the child, the statutory requirements would have been joined with the conjunction "or" rather than "and." *See Caven v. Caven*, 136 Wash. 2d 800, 810, 966 P.2d 1247 (1998) (stating use of disjunctive "or" indicates that statutory elements are alternative). Linking the grounds for termination of parental rights with the best interests of the child in this manner means the best interests of the child can never serve as a basis for terminating parental rights, only as a basis for preventing termination.

Washington's approach to the determination of the best interests of the child is entirely consistent with *Santosky*. In *Santosky*, this Court recognized, when considering the grounds for termination of parental rights, both the parents and their child share the same "vital interest in preventing erroneous termination of their natural relationship." 455 U.S. at 760. Because the standard of proof reflects "societal judgment about how the risk of error should be distributed between the litigants," 455 U.S. at 755, a clear and convincing standard is necessary to vindicate the parents' and child's "vital interest." However, once clear and convincing proof of grounds to terminate parental rights has been adduced, "the interests of the child and the natural parents do diverge," 455 U.S. at 760, obviating the need for a heightened standard of proof.

The Swensons cite several cases outside of Washington for the proposition that the best interests of the child must be proved by clear and convincing evidence. (Pet. for Cert., at 24 (*citing In re Maricopa County Juvenile Action No. JS-5209*, 692 P.2d 1027 (Ariz. 1984); *In re Kimberly*, 609 N.E.2d 73 (Mass. 1993); *In re Elijah R.*, 620 A.2d 282 (Maine 1993); *In re MGM*, 654 P.2d 994 (Mont. 1982); and *In re Gonzales*, 933 P.2d 198 (Nev. 1997).) None of these cases involve parental termination laws comparable to Washington.

While the best interests of the child serve only as a basis to deny termination in Washington, the parental termination laws at issue in the cases cited by the Swensons define the grounds for termination of parental rights in terms of the best interests of the child. Because they define the grounds for termination of parental rights in these terms, the bests interests of the child are an essential component of the determination of parental unfitness that is the basis for termination. As a result, the best interests of the child are properly subject to the same, higher burden of proof that is required to prove termination of parental rights.

For example, the best interests of the child are not a separate determination from the grounds for termination of parental rights under the Arizona statute at issue in *Maricopa County Juvenile Action No. JS-5209*, 692 P.2d at 1038. *See* Ariz. Rev. Stat. § 8-533(B) ("in considering any of the following grounds [for termination of parental rights], the court shall also consider the best interests of the child"). Similarly, in *Kimberly*, 609 N.E.2d at 75, the court referred to the consideration of the best interests of the child and the grounds for termination of parental rights as "interrelated inquiries" under Massachusetts law. *See* Mass. Gen. Laws Ann. Ch. 210, § 3(c) (defining best interests of the child in terms of parents' fitness). *In re Ashley A.*, 679 A.2d 86, 89 (Me. 1996), the court clarified that the best interests of the child are not considered independently from the grounds for parental termination under the Maine statute at issue in *Elijah R.*, 620 A.2d at 284. In *Gonzales*, 933 P.2d at 202 & n.4, the court explained that consideration of the best interests of the child is part of the parental termination inquiry under the Nevada statute at issue in that case. Because of the important distinction between the role of the best interests of the child standard in Washington and in the cases cited by the Swensons, there is no conflict.

The Washington approach to the best interests of the child is similar to that followed in several states. *In re GV*, 685 N.E.2d 406 (Ill. App. 1997) (trial court has discretion to deny termination of parental rights in the best interests of the child, even if there is clear and convincing proof of parental unfitness); *In re Boursaw*, 2000 WL 294190 (Mich. App., Mar. 17, 2000) (notwithstanding proof of statutory grounds for termination of their parental rights by clear and convincing evidence, parents can prevent termination by producing evidence that best interests of the

child militate against the same). The approaches taken by each state may vary, and the approach taken dictates the extent to which the best interests of the child are subject to a clear and convincing standard of proof.[1]

B. Because pre-termination dependency orders are temporary, limited, and subject to periodic judicial review, a lower standard of proof than that required for termination of parental rights conforms to the principles delineated in *Santosky v. Kramer*.

The Swensons attempt to create a second conflict between Washington law and this Court's decision in *Santosky* by wrongly implying that the grounds for pre-termination dependency proceedings, subject to proof by a preponderance of the evidence, form the basis for later parental termination proceedings. (Pet. for Cert., at 20-22.) This implication is entirely wrong. As noted above, the parental termination statute does not require relitigation of the original grounds for dependency, *JC*, 130 Wash. 2d at 428, 924 P.2d 21, and the determination of dependency does not have res judicata effect in termination proceedings, *KR*, 128 Wash. 2d at 144-145, 904 P.2d 1132. Termination "necessarily" requires clear, cogent and convincing evidence of "current parental unfitness." *KR*, 128 Wash. 2d at 142, 904 P.2d 1132.

While it is true that the fact that a child has been declared "dependent" is one of the elements required for termination of parental rights, Wash. Rev. Code § 13.34.180(1), it is

1. In this regard, there is nothing in *Santosky* that requires states to follow any particular substantive standards beyond the basic requirement of proving parental unfitness. 455 U.S. at 760 n.10. This Court expressly recognized that "[t]he substantive standards applied vary from State to State." 455 U.S. at 769.

merely the "historic" fact of dependency that must be proved, *JC*, 130 Wash. 2d at 426, 924 P.2d 21. This ensures that the parents have been given every opportunity to remedy their unfitness with the benefit of every available support service that dependency proceedings entail.

As a practical matter, dependency proceedings often last, as they did in this case, for an extended period of time. It is inevitable that circumstances will change over time. The expected change in circumstances is recognized in several applicable statutory provisions. *E.g.*, Wash. Rev. Code § 13.34.150 (providing for modification of orders "upon a change in circumstances"). As long as parents remain unfit to care for their children at the time of termination proceedings, termination is appropriate regardless of the precise grounds on which that unfitness is based, and regardless of whether they are the same grounds that originally led to the initiation of dependency proceedings.

The Swensons essentially argue that dependency proceedings should be held to the same heightened standard of proof as termination proceedings. This is unwarranted because dependency proceedings are limited in duration, subject to periodic judicial review. They also involve relatively limited infringement of parental rights. For example, parents may retain residential custody of their children, or as in this case, visitation rights. *See* Wash. Rev. Code § 13.34.130. Nothing in this Court's decision in *Santosky* requires Washington's dependency proceedings to be held to a heightened standard of proof.

C. Washington's parental termination law is not unconstitutionally vague.

Although the Swensons imply that Washington's parental termination law does not require a finding of current parental unfitness, as noted above, they seek to avoid the statutory language requiring such a finding by arguing that it is unconstitutionally vague. (Pet. for Cert., at 24-28.) The party asserting a void for vagueness challenge to a statute must overcome a presumption of constitutionality and prove that the statute is unconstitutional beyond a reasonable doubt. *In re CB*, 79 Wash. App. 686, 689, 904 P.2d 1171 (1995), *rev. denied*, 128 Was. 2d 1023 (1996) (citation omitted). In the context of the parental termination statute, the language in question must be unconstitutionally vague as applied. *Id.* at 689, 904 P.2d 1171. In reviewing a vagueness challenge to a provision of the parental termination statute, it is unconstitutional as applied only if the record shows that the decision reached was arbitrary. *Aschauer*, 93 Wash. 2d at 697-698, 611 P.2d 1245.

The Swensons claim that the terms "conditions" and "proper care" as they appear in Washington's parental termination law are vague. The relevant statute provides:

> That there is little likelihood that *conditions* will be remedied so that the child can be returned to the parent in the near future. A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The

> presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided. In determining whether the conditions will be remedied the court may consider, but is not limited to, the following factors:
>
> (a) Use of intoxicating or controlled substances so as to render the parent incapable of providing proper care for the child for extended periods of time and documented unwillingness of the parent to receive and complete treatment or documented multiple failed treatment attempts; or
>
> (b) Psychological incapacity or mental deficiency of the parent that is so severe and chronic as to render the parent incapable of providing *proper care* for the child for extended periods of time, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future[.]

Wash. Rev. Code § 13.34.180(5)(a-b) (formatting in original; emphasis & brackets added).

Initially, the vagueness challenge raised by the Swensons is not limited to the application of the parental termination statute in their case. Instead, their challenge is hypothetical and abstract. This is inadequate to demonstrate

unconstitutional vagueness. The decision to terminate the Swensons' parental rights was not arbitrary. The Swensons were informed of the unsatisfactory childrearing conditions in their home and, in fact, they apparently agreed that there were problems as they originally gave up their daughter voluntarily and subsequently stipulated to several renewed findings of dependency. They received, in the words of the Court of Appeals, a "saturation" of services designed to help them improve these conditions during the dependency and develop the ability to provide proper care for their daughter. At the time of the termination hearing, they were informed and heard testimony regarding the unsatisfactory conditions that persisted and their continued inability to provide proper care. In light of these facts, it cannot be gainsaid that the grounds for termination of the Swensons' parental rights were anything but vague.

In arguing that the terms "conditions" and "proper care" are vague, the Swensons ignore the context in which they occur. Although the portion of the statute quoted above is clear on its face, the terms contained therein must be interpreted in connection with the definition of a "dependent child," Wash. Rev. Code § 13.34.030(4)(b), which in turn incorporates the definition of "abuse or neglect" of a child, Wash. Rev. Code § 26.44.020(12). " 'Abuse or neglect' means the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child by any person under circumstances which indicate that the child's health, welfare, and safety is harmed[.]" *Id.* These definitions flesh out the meaning of unsatisfactory childrearing "conditions" and "proper care" by parents and prevent the terms from being unconstitutionally vague.

This Court has recognized that parental termination proceedings necessarily employ "imprecise substantive standards." *Santosky*, 455 U.S. at 762. The ostensibly vague terms in this case are materially identical to those repeatedly upheld against vagueness challenges. *E.g., Aschauer*, 93 Wash. 2d at 697-698, 611 P.2d at 1250; *In re JZ*, 190 N.W.2d 27, 35-36 (N.D. 1971) ("proper parental care or control"); *In re DT*, 237 N.W.2d 166, 169 (S.D. 1975) ("proper parental care"); *In re Metteer*, 279 N.W.2d 374, 377 (Neb. 1979) ("parental responsibilities" and "proper parental care"); *New Mexico ex rel. Health & Social Servs. Dep't v. Natural Father*, 598 P.2d 1182, 1185 (N.M. App. 1979) ("care or control"); *In re Gentry*, 369 N.W.2d 889, 893-894 (Mich. App. 1985) ("proper home" and "proper care and custody"). The Swensons' challenge should similarly be rejected here.

CONCLUSION

Based on the foregoing, Mildred Staley, Guardian ad Litem for Hannah Swenson, asks the Court to deny the petition for certiorari.

Respectfully submitted,

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